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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF WISCONSIN EX REL.,
SCOTT A. HEIMERMANN,
Petitioner,

v.

JOANNE SWYERS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Wisconsin District IV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Scott Alan Heimermann, though morally and technically innocent, was convicted 18 years ago for the August 19, 1989 murders of Milwaukee, Wisconsin, gangsters Mohammad Binwalee and Dion Russell, who were shot by Joseph Isajiw and Edward J. Piscitello a longtime informant to the Milwaukee law enforcement community. Heimermann remains in prison because no court, state or federal, has ever allowed him access to postconviction discovery or an evidentiary hearing to prove his substantive claims. Instead, those courts continue to rely on Wisconsin and federal habeas corpus procedural rules in denying Heimermann his liberty. Additionally, two state governorships have repeatedly turned down Heimermann's bids for a pardon. These courts and Wisconsin executive body continue to do this even though the state's key complaining witness who helped put Heimermann in prison wrongfully had recanted his testimony; and several new corroborating pieces of postconviction document-based evidence now undermine the state's key witness's trial testimony which also implicate Milwaukee law enforcement officials as creating the circumstances that led to the murders of Binwalee and Russell, not Heimermann. Now, over a decade later, as local law enforcement and Wisconsin prison officials deliberately blocked Heimermann's only remaining viable opportunity of court access to prove his innocence, Heimermann has filed an action under 42 U.S.C. § 1983, seeking to restore postconviction and habeas access to the courts for purposes of invalidating his convictions. The questions presented are:

1. May Heimermann use § 1983 as a devise for restoring postconviction and habeas access to the

courts when he had a pending meritorious substantive claim for which was blocked because of Respondents' deliberate wrongdoing and for which Heimermann now has no other viable forum to decide his non-frivolous claims?

2. If he can use § 1983, should Heimermann be entitled to a prospective injunction and/or compensatory and actual damages against the Respondents and their representatives to remedy the underlying injury resulting from the ongoing violation of his right to meaningful postconviction and habeas access to the courts and to prevent future violations?

PARTIES TO THE PROCEEDINGS

Petitioner Scott A. Heimermann, *Plaintiff-Appellant below, Petitioner*

Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, Lynda J. Schwandt, John Doe and John Doe 2, *Defendants below*

Respondent Joanne Swyers, *Defendant-Respondent below, Respondent*

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OPINIONS BELOW

The order denying discretionary review of the Supreme Court of Wisconsin in this case was filed on April 14, 2009, and is attached at App. 32a. The opinion of the Wisconsin Court of Appeals in this case (App. 1a) is unpublished and available at 2008 Wisc. App. LEXIS 1005.

JURISDICTION

The Supreme Court of Wisconsin issued its discretionary order on April 14, 2009. On July 9, 2009, Justice Stevens extended the time within which to file this petition for writ of certiorari to and including September 11, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

42 United States Code § 1983 provides in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proceeding for redress[.]"

STATEMENT OF THE CASE

1. *The homicides of Mohammad Binwalee and Dion Russell.* At the age of 12, at 13, and growing up on his parent's dairy farm in the rural town of Chilton in northeastern Wisconsin Scott Alan Heimermann began his efforts to become a successful entrepreneur. He went to technical school and studied real estate and finance, for which Heimermann received a Wisconsin real estate brokers license in August 1984. In mid-1986, he moved to Milwaukee, Wisconsin, and founded H.A.S. Investments Inc., which brought and renovated real estate of rundown neighborhoods in Milwaukee. In his first year of business, Heimermann's real estate company generated about $800,000 in annual revenue from real estate investments. A certain Milwaukee native named Edward J. Piscitello in early-April 1989 approached Heimermann.[1] They began swapping phone calls between in-person meetings, as eventually the two settled into a comfortable day-to-day routine looking at real estate on the south side and east side of Milwaukee. Piscitello bragged to Heimermann that he was privy to secret information relating to federal agencies seized real estate, which eventually were announced and appeared in the newspapers.[2] That is

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[1] Piscitello made contact with Heimermann at a Marquette University campus bar in Milwaukee.

[2] However, what Piscitello did not tell Heimermann was that he was a longtime informant for federal, state and local law enforcement agencies. As discussed *infra*, Heimermann received

how Heimermann ended up buying a single-family house in Milwaukee at 941 South 35th Street in late-June 1989. The arrangements for that house were made by Piscitello. And this is how both of them ended up living together at that property. (Trial Transcript, Dec. 11, 1991 at 6-14,51.) The relationship between Piscitello and Heimermann reached a sad denouement on August 19, 1989. That is when both Joseph Isajiw and Piscitello, the main architect, conspired to shoot and kill Mohammad Binwalee and Dion Russell at the residence at 941 South 35th Street. (App. 2a-3a.)

2. *The Milwaukee police investigation.* Some nineteen months after the two homicides, on March 7, 1991, Piscitello walked into the Milwaukee Police Department's downtown headquarters, where Piscitello made contact with a certain Milwaukee vice-squad detective named Barry Debraska Jr., who eventually introduced Piscitello to a certain Milwaukee homicide detective named Brian O'Keefe. Based on Piscitello's information, county Deputy District Attorney Robert Donohoo, the highest-ranking official handling the case, convened a March 8, 1991 search warrant proceeding with Piscitello, Debraska and O'Keefe. A transcript of the search warrant application held on March 8, 1991 remained sealed by court order at the request of Donohoo and that transcript was not provided to Heimermann until almost seven years after his convictions, March of 1998. Now, the transcript makes clear that both Debraska and

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new affidavits from Piscitello confirming this fact. In those affidavits, Piscitello also said that Heimermann was not a target of any criminal investigation for the purpose of Piscitello making contact with Heimermann in April 1989.

O'Keefe vouched for the reliability of Piscitello who had given Milwaukee law enforcement accurate information on drug deals on prior occasions. Piscitello told the county court commissioner that he was present in the residence at 941 South 35th Street in August 1989 when Binwalee and Russell were shot and then buried in the basement. Piscitello generally described Heimermann as being present when the two gangsters were shot but he didn't detail the alleged role of Heimermann in the two homicides. Piscitello also implicated Heimermann in pawning jewelry taken from the two gangsters. (Search Warrant Transcript, Mar. 8, 1991 at 3-10.)[3] Then, Piscitello was placed under the Federal Witness Protection Program and had been relocated to Phoenix, Arizona as a federally protected witness. Later, Piscitello relocated to San Diego, California, for reasons of his own, but let Debraska and O'Keefe know how to reach him. (1664: App. to pet. for writ of habeas corpus 44,73.)[4] Together, Debraska and his ally O'Keefe became an influential force in shaping the outcome of the homicide investigation. County prosecutor Jon Reddin, who

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[3] That Heimermann pawned jewelry in August 1989 was accurate, with a qualification: On cross-examination of several police officers at trial it was established that Heimermann *unwittingly* pawned the jewelry "for Piscitello" who "originally had taken it" from the two dead bodies. (Trial Transcript, Dec. 11, 1991 at 54,75.) In light of some two decades of postconviction litigation, it now is clear that Piscitello orchestrated the pawning of victims' jewelry to have Heimermann framed for Binwalee and Russell's murders.

[4] On June 1, 2005, Heimermann filed a petition for original writ of habeas corpus with this Court. *See* ***In Re Heimermann,*** Case No. 04-1664. Heimermann will use the prefix "1664," when referring to the file in case 04-1664.

eventually prosecuted Heimermann, also became actively involved with Debraska and O'Keefe in determining the investigation. Heimermann was arrested on April 18, 1991 at his home in Fort Lauderdale, Florida, and thereafter volunteered to return to Wisconsin.[5]

3. *Heimermann's trial and convictions.* Joseph Isajiw was the state's key witness at Heimermann's trial.[6] Isajiw testified that Heimermann allegedly agreed to lure Binwalee and Russell to his residence at 941 South 35th Street so that Isajiw and Piscitello could kill them. ***State v. Heimermann,*** 1995 Wisc. App. LEXIS 967 at *4 (Wis. App. Aug. 8, 1995) (unpublished). Nevertheless, Isajiw was an extremely flawed witness. According to a postconviction police report uncovered by Heimermann, which his trial attorney overlooked, it describes an interview and a statement by O'Keefe that he was interested in recovering the guns used in the two homicides. At first, Isajiw replied that the guns were "still in possession of a family member" and that "he was reluctant to identify this family member." Then he said he would help in the recovery of the murder weapons, but only "if arrangements could be made to leave his relatives out of this matter." (1664: App. to pet. for writ of

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[5] As in the search warrant application of March 8, 1991, a copy of the arrest warrant transcript also was kept under wraps by the state until seven years after Heimermann's convictions.

[6] Isajiw cut a deal in August 1991, pleading guilty as charged and agreed to cooperate with Milwaukee prosecutors in the separate trials of both Piscitello and Heimermann. After their trials, Isajiw was given two concurrent life sentences with a parole eligibility date of 13½ years.

habeas corpus 104.) What this means, of course, is not only that a prophylactic deal was struck between the state and Isajiw "to leave his relatives out of this matter" in exchange for Isajiw's testimony against Heimermann -- as O'Keefe never again pursued the issue of recovering the murder weapons from that early point on -- but also that the wrong person (Heimermann) was arrested and convicted and that the real criminals (Isajiw's "family member" or "relatives") have never been brought to justice. Therefore, Isajiw's 1991 trial testimony could explain why, despite his innocence, Heimermann was charged with the murders of Binwalee and Russell: it made sense why Isajiw put Heimermann in the mix, because then Isajiw could keep the spotlight far away from his "family members" or "relatives" (now confirmed to be Isajiw's brother Nick Isajiw and friends of theirs whom had resided in northern Wisconsin and who in fact harbored Isajiw as a fugitive from justice when law enforcement was looking for him after the bodies of Binwalee and Russell were brought to the forefront in March 1991) -- a point corroborated both by the state's key complaining witness Piscitello and his trial attorney Jill Tan, which she is very clear in her trial notes on two critical points: "Joe called Nick about burying the bodies ... could get weapons through Nick." (1664: App. to pet. for writ of habeas corpus 76.) In fact, Piscitello insists in his postconviction affidavit that he remembers seeing Joe Isajiw calling his brother Nick at the scene later that night of the murders, and Joe asking Nick about "wrapping the bodies." *(Id.* at 46.)

Joanne Danbrova also testified for the state at Heimermann's trial. Danbrova testified that she heard Heimermann state that "in order to get T.C.

[Binwalee] they would have to go through his body guard [Russell]" and "[k]ill him." 1995 Wisc. App. LEXIS 967 at *20. But another postconviction police report uncovered by Heimermann, which his trial attorney also overlooked, shows that that statement attributed to Heimermann by Danbrova didn't happen -- at least it was not said by Heimermann. According to this police report, Christine Schroeder confirms that the conversation Danbrova supposedly heard about killing the two gangsters did not include Heimermann, a statement that Heimermann also vehemently denied making at trial. *See* ***State v. Heimermann***, Appeal No. 97-3208 – voluntarily dismissed February 23, 1998. In short, the Milwaukee police coerced the testimony of Isajiw and Danbrova to frame Heimermann for Binwalee and Russell's murders.

Lastly, toward the end of the 1991 trial, the defense presented a witness named Christine Vanderkieft. Vanderkieft -- who like Danbrova, was a female friend of Heimermann. Vanderkieft testified to being in Fort Lauderdale, Florida, with Heimermann in September 1989, which became the new domicile of Heimermann after the two homicides. Vanderkieft recalled Heimermann telling her about the two murders, for which he said, "if anything would go down he would be framed for it." (Trial Transcript, Dec. 12, 1991 at 8.) Later, while heatedly protesting his innocence, Heimermann was convicted and sentenced to two consecutive life terms with a parole eligibility date of December 2017 (App. 3a.)

4. *Heimermann's first federal application for habeas corpus relief.* On October 30, 1995, Heimermann filed with the United States District Court for the Eastern District of Wisconsin his first petition for writ of

habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state court convictions and life sentences. Heimermann based his federal habeas application to vacate his state judgment of convictions on four interrelated claims: (a) ineffective assistance of counsel; (b) actual innocence; (c) newly discovered evidence; and (d) prosecutorial misconduct. The basic premise of these claims made reference to Piscitello being the state's key complaining witness and a confidential informant of several Milwaukee police detectives, of the same precinct as the August 19, 1989 shootings, and that Piscitello and his cohorts in Milwaukee law enforcement were the driving force behind the two homicides and having Heimermann framed. On January 5, 1996, the district court summarily dismissed Heimermann's federal habeas petition, finding Heimermann's contentions "conclusory, fanciful, and even true, would do little or nothing to undermine confidence in the outcome of Heimermann's trial." ***Heimermann v. Abrahamson***, No. 95-C-1101 at 11 (E.D. Wis. Jan. 5, 1996). Heimermann sought reconsideration, arguing for the district court to order release of withheld documents by Milwaukee prosecutors and law enforcement pursuant to Rule 6(a) Rules Governing Section 2254 Cases. Additionally, Heimermann asked the district court to order Wisconsin Department of Corrections ("WDOC") to retain Piscitello in Wisconsin and not transfer Piscitello to an undisclosed out of state facility until Piscitello was presented in federal court to testify on his relationship with Milwaukee law enforcement.[7]

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[7] While working at his prison job on April 2, 1996, Heimermann happened upon an inmate transfer document relating to prisoners being transferred out of state. That transfer document showed

Heimermann claimed that the results of this evidence would establish the prejudice necessary for his ineffective assistance and prosecutorial misconduct claims and would prove his actual innocence. The district court denied Heimermann's request for reconsideration. On appeal, the Seventh Circuit dismissed the appeal for lack of jurisdiction as to the district court's January 5, 1996 judgment, and it affirmed as to the district court's order denying Heimermann's requests for discovery and reconsideration. *See* ***Heimermann v. Abrahamson,*** Appeal No. 96-3567 (7th Cir. Feb. 21, 1997) (unpublished order). On June 2, 1997, this Court denied Heimermann's petition for writ of certiorari. *See* ***Heimermann v. Vander Ark***, 520 U.S. 1258 (1997).

5. *Heimermann's federal applications seeking authorization to file a second or successive petition for writ of habeas corpus.* Heimermann's eight application for authorization to file a second or successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(3) in November 2002 was denied. With his application, Heimermann presented several new sworn affidavits from the state's key complaining witness Piscitello. On November 16, 1998, Piscitello made initial contact of his own accord with Heimermann, but he was using intermediary Truth Bible Church in Waukesha, Wisconsin, for this and all subsequent correspondence with Heimermann to protect his witness protection location. (1664: App. to pet. for writ

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that one of the prisoner's names on it was Piscitello who was being transferred to an undisclosed out of state facility because he was deemed to be in the witness protection program.

of habeas corpus 40-41.) "Remember I put you in prison with what was called the perfect crime. Therefore, I can get you out as well,!!!" said Piscitello in his correspondence to Heimermann.

Heimermann however, did not receive Piscitello's first sworn affidavit dated December 28, 1999, until early-January 2000. (1664: App. to pet. for writ of habeas corpus 42-50.) Piscitello confirmed that he was in fact the state's key complaining witness who helped put Heimermann in prison wrongfully; he validated his working relationship with state and federal law enforcement agencies around the time he initiated contact with Heimermann in April 1989 and the time Binwalee and Russell were killed and for a period thereafter; and he implicated Milwaukee vice-squad detective Barry Debraska Jr. as having knowledge of the 1989 homicides all along, as Piscitello said he had worked with Debraska and other Milwaukee law enforcement agents in drug investigations against Binwalee and his gang during the days leading to the two homicides. (1664: App. to pet. for writ of habeas corpus 42-50.) In his new sworn affidavits, Piscitello also recanted his 1991 testimony about Heimermann: ". . . at no time was Mr. Heimermann actually aware of the murder plan nor could he have been actually aware of the same . . . nor did Mr. Heimermann participate in the commission of these murders," said Piscitello. (1664: App. to pet. for writ of habeas corpus 45.)

Other affidavits of Piscitello also were dated in December of 2000 and September 10, 2002 for which Heimermann received shortly thereafter. (1664: App. to pet. for writ of habeas corpus 51-72.) They were also submitted to the Seventh Circuit.

On June 20, 2000, as Heimermann awaited for more information from Piscitello, Agent Buford Gates for U.S. Customs Enforcement wrote to Heimermann with a detailed statement and supporting exhibits. (1664: App. to pet. for writ of habeas corpus 83-94.) Agent Gates detailed for Heimermann how Milwaukee vice-squad detective Debraska and homicide detective O'Keefe were close friends; that they had a solid working relationship; and that in 1995, both Debraska and O'Keefe falsely implicated Gates as the Milwaukee law enforcement officer that had been the driving force behind the murders of Binwalee and Russell.[8] Of course, after a thorough U.S. Customs internal investigation, Agent Gates was completely exonerated solely because of evidence that Debraska and O'Keefe's allegations were "bullshit." "If false accusations can be made against a respected federal agent, then it can certainly happen to others," said Agent Gates. (*Id.* at App. 83.) Agent Gate's information was submitted to the Seventh Circuit, too.

On November 26, 2002, without briefing or argument, the Seventh Circuit denied Heimermann's application. "Heimermann's contentions do not even remotely suggest his innocence; rather, they obliquely

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[8] This statement of Agent Gates brought into focus the purpose of Debraska (a vice-squad detective) had with his "friend" O'Keefe (the lead homicide detective) at the beginning stages of the search warrant proceeding held on March 8, 1991 and for a period thereafter: To shape the murder investigation favorably so Debraska's complicity would not be found in the two homicides and so he could benefit from prestige resulting from arrest and convictions of *other* targeted individuals of the 1989 drug investigations against Binwalee and his gang. (1664: App. to pet. for writ of habeas corpus 73-75,78-81.)

imply police misconduct regarding promises made to a confidential informant, who happens also to be one of Heimermann's codefendants. Even the CI's affidavit does not explicitly repudiate his testimony that he saw Heimermann standing over his victims holding a gun almost immediately after they were shot," said the Seventh Circuit in its decision.[9] ***Heimermann v. McCaughtry,*** Appeal No. 02-4033 (7th Cir. Nov. 26, 2002). Heimermann continued to push his case of innocence with the Seventh Circuit by filing a document entitled "motion directed to the en banc court to stay enforcement of the panel's order entered on November 26, 2002, and motion directed to en banc court for leave to file a motion requesting referral of case to a special master for factual hearing" in order to assess the reliability of the state's complaining witness Piscitello and Agent Gates. Thereafter, in a February 4, 2002 order the Seventh Circuit fined Heimermann $5,000.00 for filing this document, which the Seventh Circuit *erroneously* construed as "a petition for rehearing" under 28 U.S.C. § 2244(b)(3)(E). ***Heimermann v. McCaughtry,*** Appeal No. 02-4033 (7th Cir. Feb. 4, 2003).

6. *Heimermann's 2005 petition for an original writ of habeas corpus.* On June 1, 2005, Heimermann filed an application with this Court for an original writ of habeas corpus, with supporting appendix, pursuant to this Court's original jurisdiction. *See* Supreme Court Rule 20.4(a); 28 U.S.C. § 2241(b). Heimermann requested this Court to take the extraordinary step of

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[9] No fair-minded court can review the new information of Piscitello and Agent Gates and conclude what the Seventh Circuit said here.

instructing the United States District Court for the eastern district of Wisconsin to hold an evidentiary hearing, order discovery and make findings of fact as to whether exculpatory evidence that the state omitted in its case against Heimermann clearly establishes Heimermann's innocence. On October 3, 2005, however, this Court refused to take that extraordinary step and denied Heimermann's petition for an original writ of habeas corpus. *See* ***In re Heimermann,*** 546 U.S. 808 (2005).

7. *Heimermann's 2007 state application for postconviction relief.* Heimermann's third motion for postconviction relief pursuant to Wis. Stat. § 974.06, with supporting exhibits, in May 2007 was denied by the Milwaukee County Circuit Court. The court deemed that newly discovered document-based evidence of Binwalee's release from Milwaukee police custody on March 21, 1989 didn't sufficiently constitute a sufficiently viable postconviction discovery claim so Heimermann could prove his innocence. ***State v. Heimermann,*** 2008 Wisc. App. LEXIS 517 at *3 (Wis. App. July 1, 2008)(unpublished). Heimermann wanted the circuit court to compel the release of records presumably still being withheld by the county's prosecutors and Milwaukee law enforcement, such as: (a) any and all documentation possessed or under control of Milwaukee law enforcement (state, federal and local agencies) concerning the development and handling of Piscitello during the period of March 21, 1989 through August 19, 1989, along with the names of the law enforcement agents who had contact with Piscitello during such times and a copy of those law enforcement agents' personnel files relevant to those dates; (b) any and all Milwaukee law enforcement reports, including but not limited to original reports,

continuation reports, supplemental reports, property reports, evidence impound reports, confidential informant voucher reports, and witness statements prepared by any Milwaukee law enforcement agent concerning Piscitello and Binwalee and his gang during the period of March 21, 1989 through August 19, 1989; (c) any and all copies of any surveillance videotape from Milwaukee law enforcement concerning any drug investigations against Binwalee and his gang during the period of March 21, 1989 through August 19, 1989; (d) any and all Milwaukee law enforcement reports that will advise of what, exactly, the determination was as to why Milwaukee law enforcement decided not to oppose Binwalee's release from the Milwaukee County Jail on March 21, 1989; and (e) any and all reports prepared by Milwaukee law enforcement about Heimermann trying to be a law-abiding citizen and telephonically contacting the Milwaukee police in July 1989 and telling police that he was concerned that Piscitello was going to continue to attempt to hurt Binwalee and others and documents on Milwaukee police subsequently making contact with Heimermann at the residence at 941 South 35th Street where Piscitello and Heimermann were living together at the time (described as "as-yet-undisclosed state evidence" in this petition). 2008 Wisc. App. LEXIS 517 at *5.

Heimermann's postconviction discovery request was made under a state case known as ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), which allows a convicted defendant "a right to postconviction discovery when the sought-after evidence is relevant to an issue of consequence." *Id.* at 321; *see also* ***District Attorney's Office for the Third Jud. Dist. v. Osbourne***, 557 U.S. ___, 129 S. Ct. 2308, 2317, 2009

U.S. LEXIS 4536 (2009)(noting that, under an applicable statutory provision, a convicted defendant could raise a claim based on newly discovered evidence only if it was "pursued with due diligence."). Heimermann contended that since Piscitello was the primary complaining witness, who had gotten the criminal case going for Milwaukee law enforcement on March 7, 1991, he had a right look at this as-yet-undisclosed document-based evidence to lay out a minute-by-minute description of what Milwaukee law enforcement knew he was doing in the timeline between when Piscitello made contact with him in April 1989 and in the days leading to the deaths of Binwalee and Russell and afterwards, which information in turn would cast serious doubt on the key witness's (Isajiw's) credibility in his account of Heimermann's alleged role in the two homicides. Without ever ordering postconviction discovery or an evidentiary hearing to assess the reliability of his new evidence claim so that Heimermann could prove his innocence, the circuit court denied Heimermann's claims of newly discovered evidence because they were "implausible and based on nothing more than speculation." 2008 Wisc. App. LEXIS 517 at *3. The Wisconsin Court of Appeals affirmed the circuit court's denial of Heimermann's newly discovered evidence and postconviction discovery claims, ruling, "the evidence he has presented is insufficient to support such a claim." 2008 Wisc. App. LEXIS 517 at *6, n.4. However, the issue was not whether just this new piece of documentary evidence regarding Binwalee's release would have changed the outcome of Heimermann's 1991 trial. Rather, this document-based evidence regarding the state's release of Binwalee is *one more piece of evidence* that the state's case against Heimermann cannot be trusted. This is an affront to

any reasonable notion of due process, as deliberately withholding exculpatory evidence is, and should be, grounds for retrial, Heimermann argued to the Wisconsin appellate court. In any event, it then fell to the Supreme Court of Wisconsin, to which Heimermann had appealed, to offer Heimermann justice. That court had jurisdiction to give the state's discredited party to a crime to a double homicide theories the thrashing they deserve, and it could have, at a minimum, stood up for the Constitutional rights of Heimermann when Milwaukee police and prosecutors are trampling them. Nevertheless, the Supreme Court of Wisconsin denied Heimermann's request for discretionary review. 2008 Wisc. LEXIS 914.

8. *Heimermann's bids for a governor's pardon.* Since 2000, Heimermann had written to two governorships in Wisconsin and went through application processing seeking a pardon, only to be repeatedly denied, without the governorships ever studying and considering proffered witness testimony and other documentary-based evidence that supported Heimermann's innocence. (1664: App. to pet. for writ of habeas corpus 35-36.)

9. *Heimermann's federal civil rights action.* Heimermann had alleged in a *sworn*[10] federal civil rights complaint under 42 U.S.C. § 1983 filed on January 16, 2004 in the Dane County Circuit Court in Madison, Wisconsin, that the conduct of Respondents, undertaken while acting in their official and/or

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[10] *See e.g.*, 18 U.S.C. § 3600(a)(1).

individual capacities,[11] blocked his only remaining viable opportunity of court access to seek justice in the Outagamie County Circuit Court on February 12, 1999. (App. 7a-8a.)

On February 12, 1999, an Outagamie County judge held a habeas corpus hearing at which Respondent Swyers testified. She testified that Dodge County law enforcement and WDOC officials had a law enforcement working relationship with Heimermann in mid-1998. (Habeas Hearing Transcript, Feb. 12, 1999 at 12.) Swyers confirmed that Heimermann had provided her department and WDOC officials' undercover services in a months-long criminal investigation against former prison guards, Robert Fecke and David Muchka, in mid-1998. *(Id.; see also* 1664: App. to pet. for writ of habeas corpus 106-107.) In exchange for his services, Swyers testified that she agreed to help Heimermann in locating Piscitello who Heimermann claimed could establish that his 1991 convictions are void. (Habeas Hearing Transcript, Feb. 12, 1999 at 13-14,25-26; *see also* 1664: App. to pet. for writ of habeas corpus 108-109.)

But all that went out the window when the Respondents intentionally misled the Outagamie County judge about the true nature of the criminal investigations again Fecke; "employed improperly motivated pretexts to postpone and horse [Heimermann] around . . . regarding the Edward J.

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[11] *See* Heimermann's sworn Civil Complaint at ¶36.

Piscitello promises;"[12] and up until Piscitello died[13] denied Heimermann access to the testimony of informer Piscitello.

Therefore, it was impossible for Heimermann to get the Outagamie County judge to cut through the Gordian knot then stalling access to Piscitello. With this void, Heimermann filed a motion in Dane County Circuit Court to compel the release of the as-yet-undisclosed evidence held by Milwaukee law enforcement and prosecutors on February 5, 2007. (*See* Heimermann's Motion and Memorandum to Compel the Defendants and Their Attorneys to Produce Physical Documents That Will Establish Plaintiff's Innocence.) That filing was intended to gather the aforementioned as-yet-undisclosed state evidence and do what Heimermann said at the 1999 state habeas corpus proceeding – namely, to establish the invalid basis for his 1991 convictions based on the state's "fraud and outrageous government conduct" at the time of trial. (Heimermann's sworn civil complaint at ¶¶37-38,96-105; Habeas Hearing Transcript, Feb. 12, 1999 at 25-26.)

That state fraud and outrageous government conduct rely upon simple *uncontested* facts: Milwaukee law enforcement released Binwalee in March 1989 for the war on drugs, which then had fostered Milwaukee law enforcement's use of Piscitello to build a drug case against Binwalee and his gang, which drove Piscitello

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[12] *See* Heimermann's sworn civil complaint at ¶109.

[13] Piscitello died on September 1, 2006 in custody before Heimermann could depose him.

to luring Heimermann in April 1989 in a proposed real estate deal to become a useful, though unwitting ally, to Piscitello's scheme to murder Binwalee and Russell in August 1989. This means that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann. *See* ***State v. Steadman,*** 152 Wis. 2d 293, 302, 448 N.W. 2d 267 (Ct. App. 1989); ***United States v. Russell,*** 411 U.S. 423, 431-32 (1973). In other words, Milwaukee law enforcement navigating both Binwalee (via his release) and Heimermann (via Piscitello's initial contact) into the arms of an informant with known violent tendencies, such as Piscitello, created "a sufficiently close nexus between the state and the challenged action of [Piscitello] so that the action of the latter may be fairly treated as that of the state itself," ***Jackson v. Metro. Edison Co.,*** 419 U.S. 345, 351 (1974). Accordingly, the 1991 convictions which is based on the state's theory that Heimermann played an important role in facilitating the deaths of drug dealers Binwalee and Russell, was a fraud by the state and sheer fantasy.

In addition, Heimermann's void prosecution argument is in accord with well-established law. In ***State v. Campbell,*** 2006 WI 99, ¶¶51-55, 294 Wis. 2d 100, 718 N.W. 2d 649 (2006), citing this Court's precedent in ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.,*** 322 U.S. 238, 244 (1944), the Supreme Court of Wisconsin held that criminal defendants can disregard a judgment or order procured by fraud (holding that such "[a] judgment is a nullity and cannot create a right or obligation. It is not binding on anyone"). 2006 WI 99, ¶42 And Wisconsin provides a habeas corpus right for a criminal defendant to use to collaterally attack a void judgment

when the said judgment supplied the basis for a criminal conviction. *See generally* Wis. Stat. § 782.01; ***State ex rel. Doxtator v. Murphy,*** 248 Wis. 593, 602, 22 N.W. 2d 685, 689 (1946)(providing for discharge from custody upon petition for writ of habeas corpus "where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void"). Under these circumstances, the holding of ***Campbell*** that a claim based on fraud is void, combined with the holding of ***Doxtator***, means that Heimermann suffered prejudice because the Respondents' intentionally denied him the only remaining viable opportunity for justice in 1999.

Yet the Dane County Circuit Court dismissed Heimermann's sworn complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477 (1994), effectively continuing Respondents' deprivation of Heimermann's Constitutional right of postconviction access to the courts. Heimermann appealed, and the Wisconsin Court of Appeals affirmed, concluding that Heimermann cannot seek injunctive relief or recover money damages against the Respondents who wrongfully and intentionally blocked access to his only remaining viable opportunity for justice in 1999. (App. 8a.) The Supreme Court of Wisconsin denied Heimermann's request for discretionary review. (App. 32a.)

REASONS FOR GRANTING THE PETITION

"Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." ***United States v. Garsson***, 291 F. 646, 649 (S.D.N.Y. 1923)(Learned Hand, J.) And although the advances of forensic DNA technology has increased the

number of innocent prisoners going free lately, it would be anomalous to say that innocent people whose cases lack DNA evidence should not be freed. *See e.g.*, Samuel R. Gross, *"Exonerations in the United States: 1989 through 2003,"* 95 Journal of Criminal law & Criminology – (accepted for publication, 2005; earlier version released at http://www.umich.edu/newsandinfo/exonerations-in-us.pdf)(finding 328 wrongly convicted persons have been exonerated, *183 of them were exonerated by non-DNA evidence*). *See also* ***In Re Davis,*** 2009 U.S. LEXIS 5037 (U.S., Aug. 17, 2009)(for the first time in about 50 years prisoner's petition for original writ of habeas corpus transferred to district court for fact finding hearing to adjudicate reliability of various recanted postconviction affidavits of state witnesses). Thus, to shut the courthouse doors to most of these innocent prisoners, which applies to Heimermann's situation, is an outcome clearly not desirable to the interests of public policy and the people in the United States. But in the present case, the Wisconsin appellate court regime has attempted to create a mechanism by which a criminal defendant cannot present a non-frivolous substantive claim after government officials deliberately blocked the defendant's only remaining viable opportunity for justice after the defendant was convicted following an invalid prosecution. (App. 8a.) Therefore, the Wisconsin appellate courts' decisions give rise to the following issue that merits this Court's review:

1. The Wisconsin appellate court regime disallowed a convicted defendant to bring a claim under 42 U.S.C. § 1983 for the purpose of restoring postconviction access to the courts in connection with an already filed substantive void prosecution claim. (App. 8a.) In not allowing Heimermann to do this, the Wisconsin

appellate courts have left Heimermann without any possible route to attack his invalid 1991 convictions, instead of opening the gates to § 1983 relief in order to have his void convictions set aside. Most of the federal courts and this Court have rejected this type of disallowed use of § 1983, concluding that blocking a convicted defendant's right of access to postconviction and habeas corpus courts is not part of a challenge to the validity of a convicted defendant's conviction when a § 1983 action is the only possible route to attack a conviction.

I. CERTIORARI IS WARRANTED TO REVIEW THE WISCONSIN APPELLATE COURTS' HOLDING THAT A CONVICTED DEFENDANT CANNOT SEEK INJUNCTIVE RELIEF AND RECOVER MONEY DAMAGES AGAINST POLICE AND PRISON OFFICIALS WHO HAD INTENTIONALLY BLOCKED HIS ONLY REMAINING VIABLE OPPORTUNITY OF COURT ACCESS TO PROSECUTE A MERITORIOUS STATE HABEAS PETITION IS NOT COGNIZABLE IN 1983 ACTIONS.

A prisoner in state custody may not use a § 1983 action to challenge the fact or duration of imprisonment, but rather must seek habeas corpus relief. ***Wilkinson v. Dotson***, 544 U.S. 74, 78 (2005). The cognizability of a claim under § 1983 depends on the affect of a favorable judgment on the prisoner's claim. An action under § 1983 is barred if success on a claim would "necessarily imply the invalidity of his conviction or sentence." ***Heck v. Humphrey***, 512 U.S. 477, 487 (1994). Justice Souter, in a concurrence joined by Justices Blackman, Stevens, and O'Connor, argued that favorable termination should be required only if

prisoner is eligible for habeas corpus. 512 U.S. at 498-502 (Souter, J., concurring).

Without citing any authority other than ***Heck***, the Wisconsin appellate court concluded in a conclusory fashion that Heimermann could not seek injunctive relief and money damages against police and prison officials who have intentionally and wrongfully blocked his only remaining viable opportunity of court access to prosecute a meritorious state habeas petition. (App. 8a.) That is, the court said if Heimermann were allowed this unchecked access to the courts, the results of that access would invalidate his 1991 convictions, because the state's key complaining witness had recanted his 1991 testimony; and several new corroborating pieces of document-based evidence have now implicated Milwaukee law enforcement officials as facilitating the circumstances that led to the 1989 shootings, not Heimermann.

A. The Wisconsin Appellate Courts and Federal Courts Are Divided On This Issue.

The Wisconsin appellate courts' decisions conflict with most decisions of the federal courts on the ongoing hindered right of postconviction access issue in this case.

In one case, the U.S. District Court for the northern district of Texas allowed a claim substantially identical to Heimermann in ***Lueck v. Watten***, 262 F. Supp. 2d 690 (N.D. Tex. 2003). That court correctly concluded that the claim was cognizable under § 1983 because state officials seized documents that prevented the prisoner from filing a habeas petition. *Id.* The court did not resolve the ***Heck*** question when

the prisoner sought only prospective relief to restore access to the court so the prisoner can litigate a non-frivolous habeas claim. *Id.*

Another U.S. District Court, relying on ***Hoard v. Reddy***, 175 F. 3d 531 (7th Cir.), *cert. denied,* 528 U.S. 970 (1999), reached the same conclusion in ***Barnwell v. West***, 2006 U.S. Dist. LEXIS 9657, 2006 WL 381944, at *3 n.3, *4 (S.D. Ill. 2006). The prisoner in **Barnwell**, like Heimermann, alleged that state officials blocked access to habeas corpus remedies. The court adopted an unobjected-to portion of a magistrate judge's report and recommendation finding that the prisoner's ongoing hindrance access claim is not barred under ***Heck*** where the underlying claim is a habeas petition. *Id.*

A Seventh Circuit panel in ***Nance v. Vieregge***, 147 F. 3d 589 (7th Cir.), *cert. denied* 525 U.S. 973 (1998), ruled that Nance did not show an ongoing hindrance access claim because the prisoner had been released from state custody before he filed his federal rights action. *Id.* at 592. However, the court in ***Nance***, like the U.S. District Courts in ***Lueck*** and ***Barnwell***, recognized that ***Heck*** does not bar prospective relief to restore access to the court so the prisoner can litigate a non-frivolous habeas claim. *Id.* at 591.

Another Seventh Circuit panel reached the same conclusion in ***Hoard***. "There is probably an exception to the rule of ***Heck*** for cases in which no route other than a damages action under Section 1983 is open to the person to challenge his conviction." ***Hoard***, 175 F. 3d at 533.

Additionally, in ***Carr v. O'Leary***, 167 F. 3d 1124 (7th Cir. 1999), the Seventh Circuit held that remand was unnecessary because ***Heck*** probably would not block the 1983 suit where habeas was no longer available, based on Justice David Souter's principle in ***Spencer v. Kemna***, 523 U.S. 1 (1998).

The First Circuit acknowledged the conflict between ***Heck's*** "favorable termination" requirement and Justice Souter's principle in ***Spencer***; moreover, the court decided to leave to the Supreme Court "the prerogative of overruling its own decisions." ***Figueroa v. Rivera***, 147 F. 3d 77, 81 n.3 (1st Cir. 1998).

The Second Circuit in ***Jenkins v. Haubert***, 179 F. 3d 19, 21, 26-27 (2nd Cir. 1999), reached a similar conclusion but in the end held that ***Heck*** did not bar the prisoner's § 1983 suit over a condition (but not the fact or duration) of confinement that could not be challenged through habeas corpus.

And the Sixth Circuit also acknowledged the conflict between ***Heck's*** 'favorable termination' requirement and Justice Souter's principle in ***Spencer*** but remarked that "although ***Spencer*** may cast doubt upon the universality of the 'favorable termination' requirement, we will continue to follow the Supreme Court's directly applicable precedent . . ." ***Huey v. Stine***, 230 F.226, 229-30 (6th Cir. 2000).

B. The Wisconsin Appellate Courts' Decision Contravenes This Court's Precedent.

The Wisconsin appellate courts' rejection of Heimermann's argument that the holding in ***Heck*** is not applicable to his ongoing hindered access claim

also ignores this Court's analysis in ***Spencer v. Kemna***, 523 U.S. 1, 20-21 (1998) which, while not expressly addressing the issue, suggested that ***Heck*** may not apply to prisoners where a § 1983 action is the only possible route to attack an invalid conviction.

Justice Souter's concurring opinion was joined by Justices O'Connor, Ginsberg, and Breyer – who all wrote their concurring opinion in ***Spencer*** saying that a person who is not "in custody," and therefore lacks standing to challenge his conviction by way of habeas corpus, may seek damages in a civil action under 42 U.S.C. § 1983. ***Spencer***, 523 U.S. at 19-21.

Justice Stevens took a dissenting position in ***Spencer*** that the unavailability of a federal habeas remedy should open the gate of § 1983. ***Spencer***, 523 U.S. at 22-25.

Finally, in ***District Attorney's Office for the Third Jud. Dist. v. Osborne***, 557 U.S. ___, 129 S. Ct. 2308, 2009 U.S. LEXIS 4536 (2009) -- reversed in June by this Court -- this Court assumed, without deciding, that a freestanding substantive due process right to access state evidence claim is not barred by ***Heck***. 2009 U.S. LEXIS 4536 at *24.

C. Issues Relating To Respondents' Deliberate Deprivation Of Heimermann's Constitutional Right Of Postconviction and Habeas Access To The Court In An Ongoing And Permanent Manner Should Be Resolved By A § 1983 Action.

This case involves local police and prison officials' deliberate deprivation of a convicted defendant's

Constitutional right of postconviction and habeas access to the court in an ongoing and permanent manner. The Wisconsin appellate court regime demonstrated what can only be described as turning a blind eye to the serious (but irrefutable) allegations of outrageous government misconduct made consistently in Heimermann's pleadings while quick to rule against Heimermann involving procedural rules. The Wisconsin appellate court concluded:

> Heimermann alleges that Swyers violated his right to access to the courts by withholding certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by ***Heck.***

(App. 8a)

But ***Heck*** makes clear that it is not premised on an ongoing hindered access claim. Rather, the case arose after state prosecutors and police officials falsely arrested and destroyed evidence that resulted in Heck's conviction. ***Heck***, 512 U.S. at 478.

Heimermann's case, by contrast, is seen as more focused on government officials intentionally denying him, continues to deny him, meaningful access to postconviction and habeas courts for which is tethered to an already filed substantive void prosecution claim lost in the wake this government wrongdoing.

As discussed in part 5, *supra*, Piscitello originally wrote in November 1998 to Heimermann, but he was using intermediary Truth Bible Church to protect his witness protection location. (1664: App. to pet. for writ of habeas corpus 40-41.) Pursuant to the Respondents' promises to help Heimermann gain access to Piscitello's testimony, as confirmed by Respondent Swyers at the February 12, 1999 state habeas corpus hearing, Heimermann promptly passed the details of Piscitello's November 1998 correspondence on to the Respondents, in a bid to ensure Respondents can at the appointed time secure Piscitello's testimony, which was a critical clog in Heimermann's plan to prove his substantive void prosecution claim. But Respondents kept dragging their feet with anything that had a Piscitello label on it. It worked so well that every court, state and federal, has refused to endorse Heimermann's void prosecution claim since 1999.

Therefore, the conduct of the Respondents impeded Heimermann's efforts to pursue a non-frivolous habeas corpus claim because Piscitello's testimony and aforementioned as-yet-undisclosed exculpatory evidence that was blocked constituted testimony and document-based evidence required for an effective collateral attack on Heimermann's 1991 convictions. As Heimermann testified at the February 12, 1999 state habeas hearing, without this evidence, he could not effectively show that his 1991 convictions are

invalid. (Habeas Hearing Transcript, Feb. 12, 1999 at 25-26.) Accordingly, Heimermann has suffered prejudice. *See, e.g.*, ***Luecke***, 262 F. Supp. 2d at 695 (denying summary judgment, holding that Plaintiff established actual injury in denial of right of access to the courts claim where prison officials confiscated copy of his trial transcript and affidavit supporting theory on appeal). And Heimermann's state habeas petition was not frivolous because, as Heimermann has pointed out in his sworn complaint, he raised a substantive void prosecution claim in his state habeas petition, based on fraud by the state and outrageous government conduct. (Heimermann's sworn civil complaint at ¶¶ 37-38, 96-105,109.) As described more fully in part 9, *supra*, that fraud by the state and outrageous government conduct is based on the complicity on Milwaukee law enforcement's part in facilitating the circumstances that led to the murders of Binwalee and Russell, not Heimermann. *(See* pp. 18-19, *supra*.)

Therefore, as an initial matter, Heimermann is entitled to injunctive relief against the Respondents and their representatives in their official capacities to remedy the injury resulting from the violation of his right to meaningful postconviction and habeas access to the courts and to prevent future violations. 42 U.S.C. 6 1983; *see, e.g.*, ***Edwards v. Balisok***, 520 U.S. 641, 648-49 (1997). Specifically, Heimermann is entitled to a prospective injunction requiring Respondents and their representatives to replace Piscitello's testimony (to the extent it is replaceable) with the testimony of Piscitello's 1989 Milwaukee law enforcement handlers and to enjoin Respondents and their representatives from continuing to deprive Heimermann of his postconviction and habeas access

to the Courts. ***Lueck***, 262 F. Supp. 2d at 699 (in summary judgment context, declaring order to replace legal property proper).

Second, Heimermann is entitled to recover from respondents in their individual capacities, actual damages, resulting from the violation of his right to meaningful postconviction and habeas access to the courts. 42 U.S.C. 4 1983; ***Carey v. Piphus***, 435 U.S. 247 (1978). Since 1999, Heimermann has gathered many legal cases; reviewed, analyzed and researched these cases; compiled various legal materials; filed many legal documents with various courts; and repeatedly reviewed his trial, postconviction and habeas corpus cases, all in an effort to replace his wrongfully blocked state habeas corpus action. As to the circuit court calculating his actual damages, Heimermann intends to multiply the number of hours worked (at least 6 hours, nearly every day since 1999) at a reasonably hourly rate for Heimermann's work of $50.00. *See, e.g.*, ***Herdahl v. Pontotoc County School Dist.***, 964 F. Supp. 1113, 1118-19 (N.D. Miss. 1997)(calculating reasonably hourly rate of $50.00 for law clerks); ***In Re Public Service Co. of New Mexico***, 1992 U.S. Dist. LEXIS 16326, 1992 WI 278452 at *5 (S.D. Cal. 1992)(calculating reasonably hourly rate of $61.05 for non-attorney timekeeper).

Third, Heimermann is entitled to recover from respondents an award of compensatory damages, resulting from the proposition that Respondents' deprivation of Heimermann's Constitutional right of access to postconviction and habeas courts is a major contributing factor toward continuing the wrongful imprisonment of Heimermann. As to the circuit court calculating his compensatory damages, Heimermann

intends to have the circuit court calculate the damages on this front by multiplying the number of years of wrongful imprisonment since February 1999 (over 10 years, so far) at a reasonably rate per year of imprisonment of $1 million. *See. e.g.*, ***Limone v. United States***, 497 F. Supp. 2d 143, 243-245 (D. Mass. 2007)(calculating the $1 million dollar per year of imprisonment award for prolonged wrongful imprisonment that occurred because of criminal misconduct by FBI agents and other law enforcement corruption).

And fourth, Heimermann is entitled to recover punitive damages against Respondents, resulting from the proposition that Respondents exhibited reckless and callous indifference to Heimermann's Constitutional right to obtain postconviction and habeas access to the courts so that he can prove his innocence. 42 U.S.C. § 1983; ***Smith v. Wade***, 461 U.S. 30 (1983).

Under these circumstances, ***Heck*** was never intended as a mechanism to bar a prisoner's ability to bring a § 1983 action. As to Heimermann's sworn civil complaint, therefore, the Respondents were not entitled to dismissal based on ***Heck***.

II. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE.

This case presents an important issue of federal law: may a convicted defendant use § 1983 to restore postconviction and habeas access to the courts when he has no other forum to decide a non-frivolous claim because government officials deliberately hindered his

only remaining viable opportunity for justice. Not only has the Wisconsin appellate court regime disregarded a defendant's Constitutional right of postconviction and habeas access to the courts that links to an already filed substantive claim, it has turned a blind eye toward curing that ongoing deprivation.

In addition, there is a serious split regarding these two important aspects of the Wisconsin appellate courts. First, most federal courts have allowed use of § 1983 to overcome an ongoing and permanent hindered access to the courts in order to decide a defendant's meritorious substantive claim. Second, this Court needs to settle the question of whether ***Heck's*** "favorable termination" requirement has been supplanted by Justice Souter's principle in the 1998 case of ***Spencer v. Kemna.***

CONCLUSION

Based on all the arguments heretofore advanced, Petitioner Scott Alan Heimermann respectfully requests this Court to grant the petition for writ of certiorari. Fairness and the United States Constitution demand that this injustice be rectified at long last.

Respectfully submitted,

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Petitioner pro se

APPENDIX

APPENDIX A

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2007AP2961
Cir. Ct. No. 2004CV1499

[Filed December 18, 2008]

STATE OF WISCONSIN EX REL. SCOTT A. HEIMERMANN,	)
PLAINTIFF-APPELLANT,	)
v.	)
GARY R. MCCAUGHTRY, MARK W. CLEMENTS, JOHN O'DONOVAN, JOHN DEHAAN, MICHAEL J. SULLIVAN, CINDY O'DONNELL, STEVEN B. CASPERSON, STEPHEN M. PUCKETT,	)

SAM SCHNEITER, TIMOTHY DOUMA, LYNDA J. SCHWANDT, JOHN DOE AND JOHN DOE 2,

DEFENDANTS,

JOANNE SWYERS,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Scott A. Heimermann appeals from the orders that dismissed all of his claims against Joanne Swyers and denied his motion for reconsideration. Heimermann argues that the circuit court erred when it dismissed his claims, when it denied his motion for reconsideration, and when it granted costs to Swyers, and asks this court to order the circuit court to allow him to amend his complaint. Because we conclude that the circuit court did not err, we affirm.

BACKGROUND

¶2 Heimermann was convicted in 1992, after a jury trial, of two counts of first-degree intentional homicide as a party to a crime. He was charged with two other men, Edward Piscitello and Joseph Isajiw, for the execution-style killing of an apparent drug dealer and his body guard. The three men shot the victims and buried their bodies in the basement of a Milwaukee residence where Heimermann and

Piscitello lived. The victims' remains were not discovered until two years after they were killed.

¶3 We affirmed Heimermann's conviction, *see* ***State v. Heimermann***, No. 1995AP225, unpublished slip op. (Ct. App. Aug. 8, 1995), and the supreme court denied his petition for review. Since then, he has repeatedly attempted to challenge his conviction, both directly and indirectly.[1]

¶4 In the case before us now, Heimermann, who is still in prison, sued various State officials and Swyers. All of the State officials were employees of the Department of Corrections except Swyers who was an employee of the Dodge County Sheriff's office.[2] He

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[1] Heimermann has filed approximately thirty-nine appeals and writs in this court since 1991.

[2] Heimermann originally filed this case in June 2004. The defendants then had the case removed to the United States District Court for the Eastern District of Wisconsin. That court dismissed this case because an order of the United States Court of Appeals for the Seventh Circuit prohibited Heimermann from filing any action until he paid all outstanding sanctions against him. Heimermann then filed a motion for reinstatement in Dane County Circuit Court. The circuit court denied the motion. Heimermann appealed to this court. The State moved to strike the brief and dismiss the appeal until Heimermann paid the fines outstanding against him in state and federal courts. We certified the matter to the supreme court, which then decertified it and returned it here. We then denied the State's motion, and addressed the appeal on the merits. We concluded that the circuit court erred when it barred Heimermann from filing this action. We also concluded that, on the record before us, we could not resolve the question of whether the circuit court had properly dismissed Heimermann's complaint. We noted that the circuit court could take up these issues on remand, and, if appropriate,

alleges that the defendants violated his constitutional rights and committed breach of contract. His complaint states that: "This is one of those rare cases in [sic] which provides a significant, albeit isolated, example of a model inmate such as plaintiff whose protected activities account for the treatment he received in prison from malicious, sadistic and indifferent officials." Heimermann alleged that the defendants breached promises he claimed they made to him in exchange for his help in an undercover investigation. Heimermann also alleged that the actions of some of the defendants caused a circuit court judge to deny his petition for a writ of habeas corpus.

¶5 The circuit court identified five causes of action against Swyers: (1) breach of contract; (2) a claim under ***Heck v. Humphrey***, 512 U.S. 477 (1994); access to courts; (4) failure to protect; and (5) a concerted action claim. Heimermann demanded both temporary and permanent injunctions, a declaratory judgment, and more than four million dollars in compensatory damages. The court dismissed all of the claims against Swyers, for the reasons discussed later in this opinion, and also denied Heimermann's motion to reconsider.

STANDARD OF REVIEW

¶6 "Whether a complaint states a claim for relief is a question of law which this court reviews de novo." ***Meyer v. Laser Vision Inst., LLC***, 2006 WI

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impose appropriate sanctions. ***State ex rel. Heimermann v. McCaughtry***, No. 2005AP87, unpublished slip op. (Ct. App. Jan. 25, 2007).

App 70, ¶13, 290 Wis. 2d 764, 714 N.W.2d 223. "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." *Id.* "The reviewing court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim." *Id.* The complaint should be dismissed "only if it appears certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations. " *Id.*

DISCUSSION

¶7 Heimermann argues on appeal that the circuit court improperly dismissed the claims against Swyers and others.[3] Heimermann's first claim is that Swyers and other defendants breached a contract they made with him to get him to help in the investigation of a former prison guard, Robert Fecke. Specifically, Heimermann alleged that Swyers and the others induced him to help with the Fecke investigation by offering him immunity from further discipline on a conduct report; immunity from prosecution on any evidence obtained as a result of the investigation of Fecke; help with obtaining exculpatory evidence from his co-actor Piscitello; and having Heimermann transferred to a minimum security prison until he was released from prison. The circuit court dismissed Heimermann's breach of contract claims against Swyers on the ground that such a contract would violate public policy.

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[3] Because the order from which Heimermann appeals dismissed only the claims against Swyers, we address only those claims in this opinion.

¶8 Parties are free to enter into contracts, and the courts will protect that right "by ensuring that promises will be performed." ***Sonday v. Dave Kohel Agency, Inc.***, 2006 WI 92, ¶53, 293 Wis. 2d 458, 718 N.W.2d 631. Contractual rights, however, "are not absolute and a contract that is deemed contrary to public policy is void and unenforceable." ***Id.***

¶9 We agree with the circuit court that the contract as alleged by Heimermann is contrary to public policy. The terms of the alleged contract provide that Swyers would aid him in overturning his criminal conviction, have him transferred to a minimum security prison, and obtain exculpatory evidence from Piscitello. As the complaint acknowledges, Swyers is an employee of Dodge County and not of the Department of Corrections. Because Swyers is not an employee of the Department of Corrections, she had no authority to affect the terms or conditions of Heimermann's confinement.

¶10 Further, to the extent Heimermann is attempting to have himself exonerated from the underlying criminal conviction by information he claims Piscitello will provide, Swyers would not be able to obtain this result for him. As the State points out, achieving that result would require the acquiescence of the entire judicial system. We conclude that such a contract, if one existed, violates public policy, and the benefit allegedly bargained for was impossible for Swyers to obtain. We conclude that the circuit court properly dismissed Heimermann's claims for breach of contract.

¶11 The circuit court also dismissed Heimermann's claim that Swyers and the others

denied him substantive due process by denying him access to the alleged testimony of Piscitello.[4] When a plaintiff seeks to recover damages under 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment or other action that would render a conviction invalid, the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck,*** 512 U.S. at 486-87. Consequently, when a prisoner seeks damages under § 1983, the court must consider whether judgment for the plaintiff "would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." ***Id.*** at 487.

¶12 In his complaint, Heimermann refers to Piscitello's testimony as "the missing ingredient to plaintiff's release from prison recipe." The circuit court concluded that he was seeking exculpatory testimony from Piscitello that would call into question the validity of his underlying conviction. We conclude that, based on the allegations of the complaint, Heimermann is challenging his conviction and imprisonment, and consequently, his claim is barred by ***Heck.***

¶13 Heimermann also alleges that Swyers violated his right to access to the courts by withholding

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[4] Heimermann does not explain in his brief what the exculpatory testimony would be.

certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by ***Heck.***

¶14 Heimermann's next claim is that, because of his undercover work in the investigation of former prison guard Fecke, he is now known as a "snitch" in prison, and his "vulnerability to violence" in prison has increased. "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate" violates the Eighth Amendment's prohibition against cruel and unusual punishment. ***Farmer v. Brennan***, 511 U.S. 825, 828 (1994) (citation omitted). Not every injury suffered by an inmate constitutes an Eighth Amendment violation. ***Id.*** at 833. A prison official violates the Eighth Amendment when two conditions are met: (1) the deprivation must be "sufficiently serious," in other words "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm"; and (2) the prison official must demonstrate "deliberate indifference" to the inmate's health or safety. ***Id.*** at 834 (citation omitted).

¶15 The circuit court dismissed this claim, finding that Swyers was not a prison official. The court further rejected Heimermann's argument that Swyers

conspired with the State defendants to deprive him of a safe environment.

¶16 In his brief to this court, Heimermann argues that the allegations of the complaint are sufficient to establish that Swyers conspired with the State officials to deprive him of his Eighth Amendment rights. Heimermann argues that the complaint alleges that Swyers and the other defendants threatened him to get him to be part of the Fecke investigation, and then the defendants "expos[ed] Heimermann to live in [a] maximum security prison environment that is prevalent with violence." He further argues that the complaint alleges that he is a "model prisoner," yet he was still transferred to a maximum security prison, and that he is "actually innocent and wrongfully incarcerated."

¶17 There are several problems with this argument. First, Heimermann's complaint does not contain any allegations that Swyers in any way was a part of the decisions that led to the deprivation of his Eighth Amendment rights. Specifically, Heimermann does not allege that Swyers participated in the decisions about where he would be confined. And, second, as the State points out, Heimermann has not alleged that he has suffered any harm. Further, we note that at least a part of this claim is based on Heimermann's allegation that he was wrongfully convicted and confined. Consequently, the claim is also barred by ***Heck***. We again conclude that the circuit court properly dismissed Heimermann's claim for failure to protect.

¶18 Heimermann's last claim against Swyers is a claim for common-law conspiracy. The circuit court

dismissed this claim, finding that Heimermann had not alleged liability under WIS. STAT. § 895.045(2) (2005-06).[5] In his brief to this court, Heimermann argues that Swyers and the other defendants engaged in a common-law conspiracy to deprive him of his constitutional right to adequate access to postconviction remedies and safe environment.

¶19 In Wisconsin, "there is no such thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone." ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977) (citations omitted).

> The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful.

Id. at 246-47. The wrongful acts "must be set out with the same certainty and particularity as in an ordinary civil action . . . so that the opposite party or parties will be apprised of what they will be called on to answer" ***Id.*** at 247(citation omitted).

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[5] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> Facts should also be alleged which show that the acts done in pursuance of the conspiracy were illegal or wrongful, or that they were done for an unlawful purpose or by an unlawful means, unless the alleged conspiracy itself has for its purpose the doing of an unlawful act. An averment that a party has acted unlawfully without showing what he did is not sufficient as an averment of issuable facts, and, on the other hand, an allegation of a lawful act is not sufficient to support a charge of conspiracy.

Id. at 248 (citation omitted).

¶20 Heimermann does not specifically allege in the complaint a cause of action for civil conspiracy. In his brief to this court, Heimermann argues that his claim consists of "various combined paragraphs in the complaint. " Heimermann argues that Swyers acted with the other defendants to breach a contract and to keep him wrongfully imprisoned. We have concluded, however, that the alleged acts were not "wrongful acts." Further, we have already decided that Heimermann is not wrongfully imprisoned. Since neither the acts nor the purpose of the alleged conspiracy were wrongful, the claim must be dismissed. Because we have concluded that the circuit properly dismissed the claims against Swyers, we also conclude that the circuit court properly denied Heimermann's motion for reconsideration.

¶21 Heimermann also argues that the circuit court erred when it granted costs to the defendants. Heimermann bases his objections on the substantive

grounds argued in his brief. Because we have rejected those arguments, we also reject his challenge to the award of costs.

¶22 Heimermann's final argument is that we should remand the matter with directions to the circuit court to allow him to amend his complaint. Heimermann asserts that he filed a motion in the circuit court asking to be allowed to amend the complaint. Heimermann filed the motion to amend, however, after the court entered the order from which he appeals. The motion to amend is part of the on-going proceedings before the circuit court and is not before us in this appeal. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX B

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed November 21, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

ORDER APPROVING BILL OF COSTS OF DEFENDANT JOANNE SWYERS

Defendant Joanne Swyers has submitted a bill of costs ion the total amount of $737.52 and the plaintiff has obgj3ected to that bill of costs. The court has reviewed the objections of the plaintiff and hereby approves defendant Swyers bill of costs as submitted.

By the court this 21st day of November, 2007.

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR10

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed October 16, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

In a decision and order rendered September 28, 2007 the court dismissed all claims of the plaintiff as to defendant Joanne Swyers. In a decision and order rendered September 27, 2007, the court dismissed all claims other than those founded upon failure-to-protect and First Amendment theories, as to defendants Gary R. McCaughtry, Mark. W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan,

Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma and Lynda J. Schwandt. The plaintiff has filed a motion to reconsider these decisions, denominated "motion for reconsideration of judgment. Upon consideration of the plaintiff's motion the court concludes that it is in essence no more than a restatement of legal argument and factual assertions already found by the court to be both unpersuasive and unfounded. The plaintiff's motion for reconsideration offers no adequate basis for the relief sought and is hereby denied. Stats.

By the court this 16th day of October, 2007,

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR9

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed September 28, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

DECISION AND ORDER

The instant action began with a lawsuit filed by Plaintiff Scott A. Heimermann (Heimermann) in 2004. Heimermann, a prisoner, seeks several forms of relief, including over four million dollars in compensatory damages from Defendants Gary R. McCaughtry (McCaughtry), Mark. W. Clements (Clements), John O'Donovan (O'Donovan), John Dehaan (Dehaan), Michael J. Sullivan (Sullivan), Cindy O'Donnell (O'Donnell), Steven B. Casperson (Casperson),

Stephen M. Puckett (Puckett), Sam Schneiter (Schneiter), Timothy Douma (Douma), Lynda J. Schwandt (Schwandt) and Joanne Swyers (Swyers).[1] Swyers, as the only non-state defendant in this action, filed a Motion to Dismiss on April 30, 2007. Shortly thereafter, the remaining, state-employed defendants filed a Motion to Dismiss in Part.

On September 27, 2007, this court issued a Decision and Order in which it dismissed all but two of Heimermann's claims against the State Defendants. The court has now reviewed the parties' arguments on Swyers' motion and finds that Heimermann's contract claim must be dismissed because the alleged contract would violate public policy. Because his "Heck" and access to courts claims are not cognizable under § 1983, they must also be dismissed. Further, Heimermann's failure to protect claim must be dismissed because the complaint contains no facts from which this court may infer that Swyers willfully collaborated with the State Defendants to deprive Heimermann of his rights under the Eighth Amendment. Finally, because Heimermann's complaint fails to allege any liability under §895.045(2) Wis. Stats., he may not proceed with that claim at this time.

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[1] The court will refer to McCaughtry, Clements, O'Donovan, Dehaan, Sullivan, O'Donnell, Casperson, Puckett, Schneiter, Douma and Schwandt collectively as "State Defendants." As Swyers is not employed by the State and has filed a separate motion, the court will refer to her only as "Swyers."

BACKGROUND

The procedural background leading to the pending motion to dismiss is discussed at length in this court's September ___, 2007 Decision and Order. As noted above, Swyers filed the pending Motion to Dismiss on April 30, 2007. Swyers argues that "the sole impetus for this action is plaintiff's attempt to invalidate his previously adjudicated criminal conviction"; therefore, this action is barred by Heck v. Humphrey, 512 U.S. 477 (1994). (Swyers Br. p. 4.)[2] Essentially, Swyers argues that, because the *entire* complaint is really an attempt to obtain release from prison, it should be dismissed under Heck. This court, however, agrees with the court of appeals' characterization of Heimermann's complaint.[3] Specifically that the

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[2] On April 30, 2007, Swyers filed an affidavit containing certain facts and beliefs not clearly stated upon personal knowledge. In a May 1, 2007 Order, this court noted that it would not consider such information in the context of a motion to dismiss and indicated to Heimermann that he need not respond to the issues raised by Swyers' affidavit.

[3] In its decision remanding the case to this court, the court of appeals stated:

> [w]e next address whether the circuit court's decision should be affirmed because Heimermann has failed to state a claim or because he is improperly attempting to relitigate a conviction that he has already challenged in several prior actions. We cannot resolve these questions based on the briefing before us. However, we note that Heimermann's complaint alleges conduct that relates to incidents that have occurred since he has been imprisoned and thus does not relate to his conviction. We also note that he has presented an argument in his briefs on appeal that his claim is cognizable under Heck v. Humphrey, 512

complaint discusses and seeks remedies for *some* conduct that occurred *after* Heimermann's conviction, and which does not appear related to that conviction. Thus, the court declines to hold that Heimermann's *entire* complaint is barred by Heck and will instead individually address each of Heimermann's claims.

HEIMERMANN'S COMPLAINT

Per Heimermann, his complaint contains eight causes of action: (1) a contract based claim; (2) a "Heck" claim; (3) an access to courts claim; (4) a failure to protect claim; (5) a retaliation claim based on allegedly unjust discipline; (6) a retaliation claim based on alleged sanctioning of unjust discipline; (7) an interference with business relations claim; and, (8) a concerted action claim. (Heimermann Br., p. 5.) Briefly, Heimermann's claims against Swyers can be summarized as follows:

- *First Cause* of *Action*[4]: Breach of contract claim against Swyers and various State Defendants based on Heimermann's alleged assistance in the prosecution of Robert Fecke (Fecke). Heimermann claims that Swyers, and other State Defendants, made various promises to him in exchange for his assistance. (Compl. ¶52.) Heimermann alleges that was offered immunity from further discipline on

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U.S. 477, 489, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

State ex rel. Heimermann v. McCaughtry, 2007 WI App. 34, ¶7, 728 N.W.2d 373 (Table), 2007 WL 188898.

[4] Heimermann cites paragraphs 52-57 and 107-08 when describing these claims. (Heimermann Br., p. 5.)

conduct report 912772 and that said conduct report was to be expunged from his prison record; that he was granted immunity from prosecution based on any evidence that might come to light during the investigation; that he was promised certain exculpatory information from a witness protection inmate, Edward J. Piscitello (Piscitello); and, that he would be transferred to a minimum security facility until he was released from prison. (Id.) Based on these promises, Heimermann allegedly worked undercover on the Fecke investigation for nearly two months. (Compl. ¶53.) Heimermann claims that these promises, and his performance, led to an implied-in-law agreement that Swyers breached. (Compl. ¶108.) On a theory of quantum meruit, Heimermann argues that he should be compensated for the services he provided. (Compl. ¶107.)[5]

- *Second Cause of Action*[6]: A "Heck" claim under which Heimermann asserts that he has been denied substantive due process. (Compl. ¶109.) Relying on the same facts alleged in support of his breach of contract claim, Heimermann claims that Swyers and certain State Defendants have denied him substantive due process by denying him access to Piscitello. (Id.) Per Heimermann, "the missing

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[5] Note, Heimermann also alleges that Swyers threatened his mother in an effort to enlist his assistance. (Compl. ¶¶50-51.) It is not clear to this court exactly which claim this factual information is relevant to; however, the event purportedly occurred around the same time the alleged "promises" were made.

[6] Heimermann cites paragraphs 52-57 and 109 when describing this claim. (Heimermann Br., p. 5.)

ingredient" in his "release from prison recipe" is Piscitello's "exculpatory" testimony. (Id.)

- *Third Cause of Action*[7]*:* An access to courts claim under which Heimermann contends that Swyers and certain State Defendants perpetrated fraud upon the Outagamie County Circuit in 1999. (Compl. ¶¶96, 110.) Heimermann claims that Swyers' testimony during a 1999 habeas petition hearing led to the dismissal of that petition. (Compl. ¶98.) Heimermann alleges that Swyers lied about the nature of the investigation into Fecke and Heimermann's involvement in any illegal activity. (Compl. ¶¶98-99.) In addition, Heimermann claims that Swyers violated his rights by allowing him to remain in jail even though she knew, through the Fecke investigation, that "there is no valid legal basis or judicial order to keep plaintiff in prison." (Compl. ¶104.) Heimermann contends that Swyers knew about Piscitello's exculpatory testimony and that Fecke was helping him obtain it, but withheld that information from the judge in his habeas proceeding. (Compl. ¶103.)

- *Fourth Cause of Action*[8]*:* A failure to protect claim under §1983 against Swyers and certain State Defendants based on their failure to keep Heimermann out of general population status. (Compl. ¶112.) Heimermann claims that, as a result of his assistance in the Fecke investigation,

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[7] Heimermann cites paragraphs 96-106 and 110-111 when describing this claim. (Heimermann Br., p. 5.)

[8] Heimermann cites paragraphs 67, 69-70, 72-78, 84 and 112-13 when describing these claims. (Heimermann Br., p. 5.)

he is labeled a "snitch". (Compl. ¶112.) He argues that Swyers' deliberate indifference to his safety is a violation of his Eighth and Fourteenth Amendment rights.

- *Fifth Cause of Action*[9]: A §895.045(2) claim against Swyers in which Heimermann alleges that she "concerted" with the State Defendants against him.

DISCUSSION

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." Weber v. City of Cedarburg, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Only those allegations made within the complaint are relevant to the court's decision. Id. The court must accept the facts stated in the complaint, and the reasonable inferences that may be drawn from them, as true. Friends of Kenwood v. Green, 2000 WI App 217, ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271. In addition, the court may look to any document attached to the complaint and made part thereof. Id.

"A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." Watts v. Watts, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987).

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[9] Unlike his other claims, Heimermann does not cite his complaint in describing this claim. (Heimermann Br., p. 5.)

I. CONTRACT CLAIM

Under a unilateral contract "one party has made a promise and only that party is subject to a legal obligation." Paulson v. Olson Implement Co., 107 Wis. 2d 510, 517, fn 6, 319 N.W.2d 855 (1982). "This is typified by the law school hypothetical situation where A says to B, '[i]f you walk across Brooklyn Bridge, I promise to pay you ten dollars.'" Id. (internal quotation omitted). "A has made a unilateral contract which arises when-and if-B performs the act." Id. "A unilateral contract will be legally enforceable when it has induced substantial performance or when it has brought about a change of position on the part of the offeree." Lazarus v. American Motors, 21 Wis. 2d 76, 83, 123 N.W.2d 548 (1963).

In the instant action, Heimermann argues that his assistance in the Fecke investigation resulted in a legally binding unilateral contract between himself and Swyers. Based on the existence of this alleged contract, Heimermann contends that he is entitled to compensation; i.e. "transfer to a minimum security facility and the information supporting his factual innocence that he bargained for, earned and did not receive." (6/12/07 Heimermann Br., p. 6.)

While the Wisconsin Supreme Court has "consistently recognized that parties are free to contract and has endeavored to protect the right to contract by ensuring that promises will be performed[,] . . . . contractual rights are not absolute and a contract that is deemed contrary to public policy is void and unenforceable." Sonday v. Dave Koehl Agency, Inc., 2006 WI 92, ¶53, 293 Wis. 2d 458, 718 N.W.2d 631 (internal citation omitted). Assuming that the

allegations contained in Heimermann's complaint are true and that a unilateral contract was formed between himself and Swyers, that contract would be contrary to clear public policy and thus unenforceable.

Public policy may be expressed by statute or administrative regulation. Id. fn. 17. Under Wisconsin Statutes, the DOC shall "[s]upervise the custody and discipline of all prisoners. . . ." §301.03(2) Wis. Stats. This statute reflects a clear policy decision by the legislature concerning the authority of the DOC. In the instant action, Heimermann would have this court usurp that authority by holding that a contract in which a non-DOC employee makes certain promises with respect to an inmate's conditions of confinement is enforceable. The public's interest in the ordered administration of its prison system simply cannot be ignored because one inmate's unreasonable expectations.

Swyers is not now, nor was she at the time the contract was allegedly formed, a DOC employee. As such, she had no authority to offer immunity in prison disciplinary proceedings, expunge conduct reports or ensure Heimermann's transfer to a minimum security facility. The authority to perform each of these promises rests solely with the DOC, whose policies and procedures on each are codified in Wisconsin Administrative Code. To hold that a contract deaf to these clear statements is enforceable, would be to ignore sound public policy on the administration of Wisconsin's prison system, this the court cannot do. Therefore, this court holds that Heimermann's contract claims against Swyers must be dismissed.

II. "HECK" CLAIM

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the United States Supreme Court stated:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

In its September ___, 2007 Decision and Order, this court found that Heimermann's "Heck" claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994). Because Heimermann's "Heck" claim against Swyers is based on the same allegations and seeks the same relief, it must also be dismissed.

III. ACCESS TO COURTS CLAIM

As with the 'Heck" claim, in its September ___, 2007 Decision and Order, this court found that Heimermann's access to court claim was barred by Heck. The court found that Heimermann's access to courts claim sought exculpatory testimony, which would necessarily call into question the validity of his underlying conviction and required dismissal of the claim. Because Heimermann's access to courts claim against Swyers is based on the same allegations and seeks the same relief, it must also be dismissed.[10]

IV. FAILURE TO PROTECT CLAIM

"[T]he Eighth Amendment's prohibition against cruel and unusual punishment [is] made applicable to the States through the Fourteenth Amendment's Due Process Clause." DeShaney v. Winnebago Co. Dept. of Soc. Serv., 489 U.S. 189, 198 (1989). "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 828 (1994). "[P]rison

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[10] Further, while prisoners have a constitutional right of meaningful access to the courts, Bounds v. Smith, 430 U.S. 817, 822 (1977); § 1983 does not provide a cause of action against police officers for giving false testimony. Briscoe v. LaHue, 460 U.S. 325, 329-345 (1983).

officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Id. at 833 (internal citation omitted). "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety."Id. at 834. Rather, the Eighth Amendment is violated only when: (1) the deprivation alleged is, objectively, sufficiently serious; and, (2) the prison official demonstrates deliberate indifference to the inmate's health or safety. Id. at 835.

In the instant action, Heimermann claims that "the defendants' affirmative actions have actually increased the vulnerability of Scott to violence within the prison because of his undercover role in the Fecke et al. investigations where he is now known as a 'snitch' in prison." (Heimermann Br., p. 10, emphasis in original.) While Swyers clearly is not employed by the DOC, Heimermann, citing Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993); claims that Swyers is liable because she assisted in creating the danger.

Heimermann's reliance on Dwares is misplaced. In Dwares, the Second Circuit noted that "[a] private individual may be subject to liability under [§1983] if he or she *willfully collaborated* with an official state actor in the deprivation of a federal right." 985 F.2d at 98 (emphasis added). Heimermann's *complaint* does not, however, allege that Swyers conspired with the State Defendants to deprive him of a safe prison environment.[11]

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[11] Heimermann does appear to allege such a conspiracy in his brief. (Heimermann Br., p. 23.) However, only those allegations

Accepting the facts stated in the complaint and the reasonable inferences that may be drawn therefrom as true, the most this court can conclude is that Swyers' actions *resulted* in an unsafe environment for Heimermann. However, the complaint contains no allegations from which this court may infer that she *planned* to do so, or that she willfully collaborated with the State Defendants for such a purpose. As such, Heimermann's failure to protect claim against Swyers must be dismissed.

V. "CONCERTED ACTION" CLAIM

Wisconsin Statutes provide:

> . . . if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5).

§895.045(2) Wis. Stats. "[T]o be liable for a concerted action under Wis. Stat. §895.045(2) the persons must have acted in accordance with a common scheme or plan to accomplish the result that caused the injury." Richards v. Badger Mut. Ins. Co., 2006 WI App. 255, ¶2, 297 Wis. 2d 699, 727 N.W.2d 69. In his brief, Heimermann argues that

> this Court should conclude on the basis of Swyers procuring [his] services in the investigation of Fecke et al. through false promises to [him], where later state defendants

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made within the complaint are relevant to this court's decision.

> caused further injury when increasing Scott's vulnerability in maximum security prisons and repeatedly issuing fabricated disciplinary tickets while [he] is illegally imprisoned, properly can be considered a cause of action within the meaning of Wis. Stat. §895.045(2).

(Heimermann Br., p. 13.)

However, this court need not reach the question of whether Swyers and the State Defendants acted in accordance with a common scheme or plan to accomplish Heimermann's alleged injuries because his complaint fails to allege any liability under §895.045(2). Heimermann thus failed to provide Swyers with sufficient notice of any such claim. As such, the court holds that Heimermann may not proceed with his concerted action claim at this time.

CONCLUSION

Because the alleged contract would violate public policy, Heimermann's contract claim against Swyers' must be DISMISSED.

Heimermann's "Heck" and access to courts claims both challenge the very fact of his imprisonment, they are not cognizable under §1983. Heimermann's "Heck" and access to courts claims against Swyers are therefore DISMISSED.

As the complaint contains no allegations from which this court may infer that Swyers willfully collaborated with the State Defendants to deprive him of his rights under the Eighth Amendment,

Heimermann's failure to protect claim against Swyers must also be DISMISSED.

Finally, because Heimermann's complaint fails to allege any liability under §895.045(2), he may not proceed with that claim at this time.

In short, the court orders that Heimermann's complaint against Swyers is DISMISSED WITH PREJUDICE. This Decision and Order is a final order that disposes of the entire matter in litigation as to defendant Swyers and, as to defendant Swyers, it is intended by the court to be an appealable order within the meaning of sec. 808.03(1), Wis. Stats.

By the court this 28th day of September, 2007.

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR7

APPENDIX E

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You are hereby notified that the Court has entered the following order:

No. 2007AP2961
Heimermann v. McCaughtry L.C.#2004CV1499

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Scott A. Heimermann, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

David R. Schanker
Clerk of Supreme Court

(2)

No. 09-334

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SCOTT A. HEIMERMANN,

Petitioner,

v.

GARY R. MCCAUGHTRY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin District IV

BRIEF IN OPPOSITION OF RESPONDENT JOANNE SWYERS

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Petitioner fails to present an issue worthy of consideration by this Court where his claims under 42 U.S.C. § 1983 call into question the validity of his conviction and where dismissal of these claims pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) has not been shown to conflict with controlling precedent.

PARTIES TO THE PROCEEDINGS

Petitioner Scott A. Heimermann, *Plaintiff-Appellant below, Petitioner*

Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, Lynda J. Schwandt, John Doe and John Doe 2, *Defendants below*

Respondent Joanne Swyers, *Defendant-Respondent below, Respondent*

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INTRODUCTION

Through his petition for a writ of certiorari (Petition), Petitioner Scott A. Heimermann improperly attempts to reinvent his claims against Respondent Joanne Swyers. The Petition itself discloses that the Wisconsin Court of Appeals correctly concluded that Petitioner's claims under 42 U.S.C. § 1983 are barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). Petitioner does not identify a conflict between a decision of a state court of last resort and the relevant decisions of this Court on an important federal question. Petitioner does not identify a conflict between a decision of a state court of last resort and a United States Court of Appeals on an important federal question. Petitioner does not identify an important question of federal law that has not been, but should be, settled by this Court. Petitioner has presented no reasons justifying certiorari review in this case. His Petition should be denied. Sup. Ct. R. 10.

STATEMENT OF THE CASE

Petitioner "was convicted in 1992, after a jury trial, of two counts of first-degree intentional homicide as a party to a crime." (Petitioner's Appendix [P. App.] at 2a, ¶ 1). Along with two other men, Edward Piscitello and Joseph Isajiw, Petitioner was charged for the execution-style killing of an apparent drug dealer and his bodyguard in Milwaukee, Wisconsin.

(P. App. at 2a, ¶ 2). Petitioner's conviction was affirmed by the Wisconsin Court of Appeals in *State v. Heimermann*, No. 95-0225-CR, 1995 WL 465150 (Wis. Ct. App. Aug. 8, 1995), and the Supreme Court of Wisconsin denied his petition for review. (P. App. at 3a, ¶ 3). As summarized by the Wisconsin Court of Appeals, Petitioner has since "repeatedly attempted to challenge his conviction, both directly and indirectly," having "filed approximately thirty-nine appeals and writs in [the Wisconsin Court of Appeals] since 1991." (P. App. at 3a, ¶ 3 n.1). According to Petitioner, he has also pursued avenues for habeas corpus relief through the federal courts. (Petition at 7-13). However, none of his challenges have been successful and Petitioner remains in prison.

In May 2004, Petitioner filed in the Dane County Circuit Court a Complaint against Respondent Joanne Swyers and numerous state defendants.[1] (*See* P. App.

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[1] The state defendants include Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, and Lynda J. Schwandt. (P. App. at iii, 17a-18a). The Dane County Circuit Court Order from which Petitioner appealed to the Wisconsin Court of Appeals dismissed only the claims against Respondent Swyers. (P. App. at 5a, ¶ 7 n.3). The state defendants were not named as Respondents in the proceedings below. (P. App. at 1a). The state defendants are not named as Respondents in the Petition before this Court. Contrary to Petitioner's frequent and somewhat confusing references to "Respondents" throughout his Petition, *see, e.g.*, Petition at i-ii (Questions Presented), Respondent Swyers is the only Respondent before this Court. On September 17, 2009,

(Continued on following page)

at 17a). In the Complaint, Petitioner asserted five claims against Respondent, including: 1) a breach of contract claim; 2) a claim alleging denial of substantive due process relating to post-conviction access to evidence; 3) an access to courts claim; 4) a failure to protect claim; and 5) a claim of concerted action under Wis. Stat. § 895.045(2). (P. App. at 20a-23a; *see also* P. App. at 4a, ¶ 5). Petitioner requested relief in the form of temporary and permanent injunctions, a declaratory judgment and more than four million dollars in compensatory damages. (P. App. at 4a, ¶ 5).

Respondent is an employee of Dodge County, Wisconsin and at the times relevant to the Petition worked as an investigator with Dodge County Sheriff's Department. In 1998, Respondent investigated criminal activity at the Dodge Correctional Institution, a Wisconsin Department of Corrections facility. In this capacity, Respondent encountered Petitioner, learned of his involvement in criminal activity, and interacted with Petitioner in the context of an investigation. She is not now, nor was she at the times addressed by the Petition, employed by any Milwaukee law enforcement agency or Milwaukee prosecutor's office.

Respondent moved to dismiss all of Petitioner's claims against her. (P. App. at 18a). The Dane County Circuit Court granted Respondent's motion, dismissing

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counsel for the state defendants filed a Waiver indicating no response to the Petition would be filed on their behalf.

the claims with prejudice by Order dated September 28, 2007. (P. App. 31a). In so doing, the Dane County Circuit Court incorporated portions of analysis set forth in its September 27, 2007, Order dismissing some of Petitioner's claims against the state defendants. (P. App. 18a-19a, 27a).[2] As is relevant to this Court's consideration of the Petition, the Dane County Circuit Court found the Petitioner's substantive due process and access to courts claims barred by *Heck*. (P. App. at 26a-27a, 30a-31a; R. App. at 7, 11-14, 18).

Petitioner appealed from the Dane County Circuit Court Orders dismissing his claims against Respondent, denying his motion for reconsideration, and awarding costs to Respondent. (P. App. at 2a, ¶ 1). The Wisconsin Court of Appeals affirmed each of the orders from which Petitioner appealed. (P. App. at 1a-12a). Petitioner next petitioned the Supreme Court of Wisconsin for discretionary review of the treatment of his substantive due process claim relating to post-conviction access to evidence and his access to courts claim.[3] (*See* Petition at 20). The Supreme Court of Wisconsin denied his petition for review. (P. App. at 32a-33a).

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[2] The September 27, 2007, Dane County Circuit Court Order is made a part of the Appendix to this Brief in Opposition. (Respondent's Appendix [R. App.] 1-19).

[3] Petitioner also sought review by the Supreme Court of Wisconsin of his failure to protect claim, but that issue does not bear on the Petition before this Court.

The Wisconsin Court of Appeals reviewed *de novo* whether Petitioner's Complaint stated a substantive due process claim relating to post-conviction access to evidence and an access to courts claim. (P. App. at 4a-5a, ¶ 6) (citing *Meyer v. Laser Vision Inst., LLC*, 2006 WI App 70, ¶ 13, 290 Wis. 2d 764, 714 N.W.2d 223). The Wisconsin Court of Appeals discussed these claims as follows:

> ¶11 The circuit court also dismissed Heimermann's claim that Swyers and the others denied him substantive due process by denying him access to the alleged testimony of Piscitello.[4] When a plaintiff seeks to recover damages under 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment or other action that would render a conviction invalid, the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. Consequently, when a prisoner seeks damages under § 1983, the court must consider whether judgment for the plaintiff "would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

¶12 In his complaint, Heimermann refers to Piscitello's testimony as "the missing ingredient to plaintiff's release from prison recipe." The circuit court concluded that he was seeking exculpatory testimony from Piscitello that would call into question the validity of his underlying conviction. We conclude that, based on the allegations of the complaint, Heimermann is challenging his conviction and imprisonment, and consequently, his claim is barred by *Heck*.

¶13 Heimermann also alleges that Swyers violated his right to access to the courts by withholding certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by *Heck*.

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[4] Heimermann does not explain in his brief what the exculpatory testimony would be.

(P. App. at 6a-7a, ¶¶ 11-12).

REASONS FOR DENYING THE PETITION

I. THE PETITION ITSELF REFLECTS PETITIONER'S ATTACK ON HIS CONVICTION, AND CONFIRMS THE WISCONSIN COURT OF APPEALS APPROPRIATELY CONLUDED PETITIONER'S § 1983 CLAIMS ARE BARRED BY *HECK V. HUMPHREY*, 512 U.S. 477, 114 S. CT. 2364 (1994).

In his Statement of the Case, Petitioner presents a distorted and unnecessarily expansive background, beginning with his own upbringing and continuing through the Supreme Court of Wisconsin's denial of discretionary review below. (Petition at 2-20). Petitioner first mentions Respondent in the last of nine subsections in his Statement of the Case. (Petition at 16-17). The accuracy of much of the information presented cannot be confirmed and is, in any event, irrelevant to this Court's consideration of the Petition.

Through his § 1983 Complaint, Petitioner sought unspecified "exculpatory evidence" from Piscitello, another of the men charged with the murders for which Petitioner was convicted as a party to the crimes. As noted by the Dane County Circuit Court, Petitioner alleged that this exculpatory evidence was "the missing ingredient" in his "release from prison recipe." (P. App. at 21a-22a) (quoting Complaint ¶ 109). The Wisconsin Court of Appeals similarly understood this to be Petitioner's objective based on his appellate briefs. (P. App. at 5a, ¶ 7) (summarizing Petitioner's claims as including a claim that Respondent

and others offered to help him obtain "exculpatory evidence from his co-actor Piscitello"); (Petition at 7a, ¶ 12) ("In his complaint, Heimermann refers to Piscitello's testimony as the 'missing ingredient to plaintiff's release from prison recipe.' ").

The Wisconsin Court of Appeals understood Petitioner to be claiming that Respondent "denied him substantive due process by denying him access to the alleged testimony of Piscitello" though Petitioner failed to explain in his appellate brief "what the exculpatory testimony would be." (P. App. at ¶¶ 11 n.4). The Wisconsin Court of Appeals further understood Petitioner to be claiming that Respondent denied his "right of access to the courts by withholding certain information" including about "her attempts to locate Piscitello" thereby preventing the Wisconsin Circuit Court hearing the habeas petition "from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice." (P. App. at 7a-8a, ¶ 13). The Wisconsin Court of Appeals concluded that Petitioner's claims were both barred by *Heck* because they called into question the validity of his conviction and challenged Petitioner's conviction and imprisonment. (P. App. at 7a-8a, ¶¶ 12-13). As the Wisconsin Court of Appeals observed in discussing other aspects of Petitioner's Complaint, "to the extent Heimermann is attempting to have himself exonerated from the underlying criminal conviction by information he claims Piscitello will provide, Swyers would not be able to obtain this result for him." (P. App. at 6a, ¶ 10).

Petitioner now attempts to reinvent and recast his § 1983 claims against Respondent for purposes of his Petition. He no longer couches the evidence sought in terms of Piscitello's allegedly exculpatory testimony. This may be owing to Petitioner's acknowledgement that he obtained and presented to more than one reviewing court multiple affidavits by Piscitello but was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison. (Petition at 10-12). These efforts may also be due to his assertion that Piscitello died in September 2006. (Petition at 18 n.13).

Unlike his Complaint, the Petition is focused on what Petitioner calls "'as-yet-undisclosed state evidence'" consisting of "records presumably still being withheld by the county's prosecutors and Milwaukee law enforcement." (Petition at 13-14). Petitioner's reinvention of his claims is problematic for a number of reasons. These records are not the subject of Petitioner's Complaint allegations or claims against Respondent nor were these claims addressed by the courts below. Petitioner is even uncertain as to the existence of any such records. Petitioner has not alleged or established that Respondent, who is neither a member of the City of Milwaukee Police Department nor the Milwaukee County District Attorney's Office, has control over any such records.

The Petition otherwise confirms that, through his § 1983 action, Petitioner is improperly challenging the validity of his criminal conviction. He states that his co-actor Piscitello framed him for the murders

underlying Petitioner's conviction. (Petition at 4 n.3). Petitioner recounts the Milwaukee Police Department's investigation and Milwaukee County District Attorney's Office's prosecution of the murders, Petition at 3-7, before concluding "the Milwaukee police coerced the testimony of Isajiw and Danbrova to frame Heimermann for Binwalee and Russell's murders." (Petition at 7). Petitioner also attacks the motivations of Milwaukee law enforcement officers in their investigation. (Petition at 11 n.8). Petitioner then contorts these dubious assertions to state "that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann." (Petition at 19) (citing *State v. Steadman*, 152 Wis. 2d 293, 302, 448 N.W.2d 267 (Wis. Ct. App. 1989); *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637 (1973)). Petitioner apparently contends that by failing to oppose the release from custody of murder victim Binwalee and by allowing Petitioner to interact with Piscitello, "Milwaukee law enforcement" engaged in conduct justifying treating Piscitello and the state as one. (Petition at 19) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 245, 351 (1974)). The three cases cited are inapplicable to Petitioner's claims and do not justify certiorari review. The cases cited only evince Petitioner's improper attack on his conviction through his § 1983 claims.[4]

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[4] *Steadman* involved a due process claim asserting that the government's involvement in providing all the elements for the

(Continued on following page)

In stating that his "void prosecution argument is in accord with well-established law," Petition at 19, Petitioner confirms that his claims are *Heck* barred. He relies upon *State v. Campbell*, 2006 WI 99, ¶¶ 51-55, 294 Wis. 2d 100, 718 N.W.2d 649 (citing *Hazel-Atlas Glass Co.*, 322 U.S. 238, 244, 64 S. Ct. 997 (1944)) and *State ex rel. Doxtater v. Murphy*, 248 Wis. 2d 593, 602, 22 N.W.2d 685 (1946). (Petition at 19-20). The cases cited are inapplicable to Petitioner's claims and do not justify certiorari review. Petitioner's assertion and the cases he cites further evince his improper attack on his conviction through his § 1983 claims.[5]

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commission of the crime of which Steadman was convicted warranted dismissal of the charges. The Wisconsin Court of Appeals found no due process violation. 152 Wis. 2d at 296-303. In *Russell*, this Court reversed a decision of the United States Court of Appeals for the Ninth Circuit which improperly expanded the traditional notions of entrapment to recognize a new defense. 411 U.S. at 427-36. *Jackson* addressed whether a privately owned utility subject to substantial state regulation is engaged in state action and is therefore subject to due process scrutiny for having terminated a customer's electric service, which termination was challenged in a § 1983 action. This Court found no state action by the utility. 419 U.S. at 351-60.

[5] In *Campbell*, the Supreme Court of Wisconsin held that a circuit court may permit collateral attack on a judgment or order procured by fraud if the fraud is jurisdictional making the order or judgment void and negating an element of a crime, or if the fraud raises an affirmative defense to the crime. 2006 WI 99, ¶ 4. *Doxtater* found that a criminal defendant who entered a guilty plea was not entitled to a writ of habeas corpus though the trial court erred in failing to advise the defendant of his right to counsel because the defendant had an adequate remedy

(Continued on following page)

The Petition itself demonstrates that the Wisconsin Court of Appeals properly concluded that Petitioner's § 1983 claims against Respondent are barred by *Heck*. The Petition should be denied.

II. PETITIONER HAS NOT SHOWN A CONLICT BETWEEN THE WISCONSIN COURT OF APPEALS' DECISION AND THIS COURT'S PRECEDENT.

Petitioner asserts that a conflict exists between the Wisconsin Court of Appeals' decision affirming dismissal of his access to courts claim and claim for access to post-conviction evidence and this Court's precedent in *Spencer v. Kemna*, 523 U.S. 1, 20-21, 118 S. Ct. 978 (1998) and *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308 (2009) ("*Osborne*"). He is incorrect.

Spencer addressed whether a pending petition for a writ of habeas corpus seeking to invalidate an order revoking parole was mooted by Spencer's release upon serving his entire term of imprisonment. *Spencer*, 523 U.S. at 3. The majority of this Court held that Spencer's release rendered his habeas petition moot, as there were no collateral consequences adequate to meet the injury-in-fact requirement of Article III of the United States Constitution. *Id.* at 14. This Court rejected Spencer's argument that his

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through appeal or a writ of error to review his conviction. 248 Wis. at 603.

habeas petition could not be moot because he would be foreclosed under *Heck* from pursuing damages in an action under 42 U.S.C. § 1983. *Id.* at 17. Justice Scalia observed, "This is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.*

Petitioner relies only on the concurring opinion of Justice Souter in *Spencer*, which discusses the anomalous results that would occur through "application of the favorable-termination requirement [of *Heck*] to § 1983 suits brought by plaintiffs not in custody." *Id.* at 20-21 (Souter, J., concurring). Justice Souter wrote, "The better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21.

Even if Petitioner could show that what he labels "Justice Souter's principle in *Spencer*," Petition at 25, is the controlling authority of this Court, it is inapplicable to Petitioner's claims. Petitioner neither alleged in his Complaint nor asserts in his Petition that he is not "in custody." Nor could he; Petitioner remains in custody serving a sentence on the very conviction impugned by his § 1983 claims. The Wisconsin Court of Appeals' decision is not in conflict with the holding of *Spencer*.

Citing *Osborne*, Petitioner states "this Court assumed, without deciding, that a freestanding substantive due process right to access state evidence claim is not barred by *Heck*." (Petition at 26). Petitioner mischaracterizes the holding and applicability of *Osborne*.

Osborne filed a § 1983 action claiming that the Due Process Clause and other constitutional provisions gave him a constitutional right to access existing DNA evidence in the state's possession in order to conduct more discriminating testing than was available at the time of his criminal trial. *Osborne*, 123 S. Ct. at 2315. The district court initially dismissed these claims as barred by *Heck*, concluding Osborne was required to proceed through a writ of habeas corpus. *Id.* The United States Court of Appeals for the Ninth Circuit reversed this decision without expressing an opinion as to whether Osborne had been deprived of a federally protected right. *Id.* (citing *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050, 1056 (9th Cir. 2005)). On remand, the district court addressed cross summary judgment motions and concluded that "there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought." *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 445 F. Supp. 2d 1079, 1081 (2006). The Ninth Circuit affirmed, basing its decision on precedent recognizing the prosecutorial duty to disclose

exculpatory evidence in the context of pre-trial disclosures. *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 521 F.3d 1118, 1128 (9th Cir. 2008).

This Court granted certiorari and reversed, concluding the Ninth Circuit improperly expanded the scope of the Due Process Clause and this Court's holdings in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987) and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) to include a procedural due process right to post-conviction access to evidence. *Osborne*, 129 S. Ct. at 2315-22. In reaching the determination that Osborne did not state a procedural due process claim, this Court "assume[d] without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne's § 1983 claim." *Id.* at 2319. Although the Court of Appeals did not address Osborne's claim on substantive due process grounds, Osborne asked this Court to "recognize a freestanding right to DNA evidence untethered from the liberty interests" that he sought to vindicate. *Id.* at 2322. This Court expressly "reject[ed] the invitation" and concluded that in the circumstances of Osborne's case "there is no such substantive due process right." *Id.* To the extent Petitioner suggests that in *Osborne* this Court recognized a freestanding substantive due process right to access state evidence post-conviction, he is incorrect.

Petitioner has not demonstrated a conflict between this Court's precedent and the decision of the Wisconsin Court of Appeals. The Petition should be denied.

III. PETITIONER HAS NOT SHOWN A CONFLICT BETWEEN THE WISCONSIN COURT OF APPEALS' DECISION AND FEDERAL APPELLATE PRECEDENT ON THE APPLICABILITY OF *HECK V. HUMPHREY*.

Petitioner asserts that a conflict exists between the Wisconsin Court of Appeals' decision and "most decisions of the federal courts on the ongoing hindered right of postconviction access issue." (Petition at 23). Implicit in Petitioner's position is the notion that his claims fall within an exception to *Heck* and that he is not required to have first successfully challenged his conviction. Petitioner asserted § 1983 claims for damages against Respondent in his Complaint. He seems now to suggest that he is also seeking injunctive relief, though it was not alleged in the Complaint and, as discussed, has taken on a new form through his Petition.

Petitioner also conflates being unable to pursue habeas relief in the first instance with his own circumstance of having unsuccessfully pursued such relief in multiple forums. In *Heck v. Humphrey*, this Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state

> tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. 477, 486-87, 114 S. Ct. 2364 (1994).

Moreover, the federal appellate cases pointed to by Petitioner are factually distinguishable.[6] (Petition

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[6] Petitioner also points to two district court cases, one of which is unpublished, and neither of which has been cited or adopted by a federal court of appeals. Petitioner characterizes his claim as "substantially identical", Petition at 23, to the claim addressed in *Lueck v. Wathen*, 262 F. Supp. 2d 690 (N.D. Tex. 2003). However, Lueck was a prisoner actually in possession of specific documents including the affidavit of a key witness to the crime underlying his conviction, that he hoped would establish the ineffective assistance of his trial counsel based on counsel's

(Continued on following page)

at 23-25). In *Carr v. O'Leary*, 167 F.3d 1124, 1125 (7th Cir. 1999), Carr had a pending § 1983 lawsuit asserting due process claims against prison officials at the time that *Heck* was decided. The United States Court of Appeals for the Seventh Circuit held that because Carr had been released from prison and could no longer seek habeas relief, his claims were not barred by *Heck*. *Id.* at 1127. *Figueroa v. Rivera*, 147 F.3d 77, 80-81 (1st Cir. 1998), involved § 1983 claims by the family members of an inmate who died in custody while in the process of challenging his conviction through a habeas petition. The court found that no equitable exception to *Heck* existed. 147 F.3d at 81. *Jenkins v. Haubert*, 179 F.3d 19, 21 (2nd Cir. 1999) involved § 1983 claims based on disciplinary sanctions affecting the conditions of confinement, but not fact or duration of confinement. The United States Court of Appeals for the Second Circuit concluded that such claims are not barred under *Heck* and the

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failure to interview the witness. 262 F. Supp. 2d at 695. These materials were confiscated and not returned by prison officials later named as defendants in a § 1983 action. *Id.* at 693. Lueck alleged he was unable to obtain another affidavit from the key witness. *Id.* at 693-95. Unlike Petitioner, who challenged his conviction through a habeas petition and various subsequent appeals and proceedings, Lueck's § 1983 claim was based on his alleged inability to assert a challenge at all. *Id.* at 697. Similarly, in *Barnwell v. West*, an inmate claimed that an inadequate law library and misrepresentations by an official regarding his access to the law library prevented his late-filing of a petition. *Barnwell v. West*, No. 02-CV-0925-DRH, 2006 WL 381944, at *1-*4 (N.D. Ill. Feb. 16, 2006). *Lueck* and *Barnwell* are inapplicable to show an exception to *Heck* for Petitioner's claims.

holding of *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584 (1997), if the prisoner is unable to challenge the conditions of confinement through a petition for federal habeas corpus. *Jenkins*, 179 F.3d at 21.

Petitioner points to *Huey v. Stine*, 230 F.3d 226, 227-28 (6th Cir. 2000), a case involving an inmate's § 1983 claims of cruel and unusual punishment based on his altercation with jail staff and the resulting disciplinary sanctions. The court concluded that *Heck* applied to bar the claims even if the inmate was no longer "in custody" for purposes of pursuing federal habeas relief. 230 F.3d at 229-31. In *Nance v. Vieregge*, 147 F.3d 589 (7th Cir. 1998), an inmate was being transferred to a facility closer to the court that was hearing his motion to withdraw his guilty plea. The property clerk told the inmate he could not take his legal documents, which included "photocopies of cases Nance wanted to have handy when arguing in support of his motion" but the warden assured him the papers would follow him. 147 F.3d at 590. When the papers were not transferred, a ruckus ensued and the inmate received a mild sanction. *Id.* The court addressed whether the inmate stated an access to the courts claim and concluded that the inmate had two available options: to proceed in state court for damages for the value of the photocopies as personal property, or to initiate a collateral attack on the judgment resting on his guilty plea. *Id.* at 591-92. The court did not find an exception to *Heck*.

Petitioner remains "in custody," has not been released from prison, is not deceased, and has pursued habeas relief. He is not asserting conditions of confinement or cruel and unusual punishment claims. The cases he cites are inapplicable to show an exception to *Heck* for Petitioner's claims.

The cases relied upon by Petitioner do not demonstrate a conflict between the Wisconsin Court of Appeals' decision and federal appellate precedent. He has not demonstrated any conflict justifying certiorari review. The Petition should be denied.

IV. PETITIONER HAS NOT IDENTIFIED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner suggests that this Court should address whether a convicted defendant may "use § 1983 to restore post-conviction and habeas access to the courts when he has no other forum to decide a non-frivolous claim because government officials deliberately hindered his only remaining viable opportunity for justice." (Petition at 31-32). What Petitioner essentially requests is that this Court provide him with *additional* post-conviction access to the courts. The Petition seeks relief unique to Petitioner's circumstances born of years and years of post-conviction litigation. He has not identified an important question of federal law which has yet to be addressed by this Court. The Petition should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

State ex rel.
Scott A. Heimermann

Plaintiff,

vs.

Gary R. McCaughtry, et al.,

Defendants.

Case No. 04 CV 1499

DECISION AND ORDER

The instant action began with a lawsuit filed by Plaintiff Scott A. Heimermann (Heimermann) in 2004. Heimermann, a prisoner, seeks several forms of relief, including over four million dollars in compensatory damages, from Defendants Gary R. McCaughtry (McCaughtry), Mark. W. Clements (Clements), John O'Donovan (O'Donovan), John Dehaan (Dehaan), Michael J. Sullivan (Sullivan), Cindy O'Donnell (O'Donnell), Steven B. Casperson (Casperson), Stephen M. Puckett (Puckett), Sam Schneiter (Schneiter), Timothy Douma (Douma), Lynda J. Schwandt (Schwandt) and Joanne Swyers (Swyers). Swyers, as the only non-state defendant in this action, filed a Motion to Dismiss on April 30, 2007.[1] Shortly

[1] The court will refer to McCaughtry, Clements, O'Donovan, Dehaan, Sullivan, O'Donnell, Casperson, Puckett, Schneiter,
(Continued on following page)

thereafter, the State Defendants filed a Motion to Dismiss in Part.

Both motions have been fully briefed and the court finds this matter ripe for resolution; however, in the interest of clarity, this Decision and Order addresses only the State Defendants' motion. For the reasons set forth herein, the court holds that Heimermann's contract, retaliation, "Heck" and access to courts claims against the State Defendants are dismissed. In addition, the portion of his interference with business claims grounded in due process is also dismissed. Finally, Heimermann may not proceed on any Wisconsin Organized Crime Control Act (WOCCA) and the Racketeer Influenced and Corrupt Organizations Act (RICO) claims at this time. Therefore, only his failure-to-protect and First Amendment based interference with business claims remain.

BACKGROUND[2]

Heimermann is an inmate in the custody of the Wisconsin Department of Corrections (DOC) and each

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Douma and Schwandt collectively as "State Defendants." As Swyers is not employed by the State and has filed a separate motion, the court will refer to her only as "Swyers."

[2] The procedural background leading to the current motions to dismiss is lengthy and complicated. As such, this court will not detail every filing presented in the last three years, but will instead briefly detail those procedural highlights most relevant to the pending motions.

of the State Defendants are employed by the DOC. Briefly, the State Defendants hold, or have held, the following positions with the DOC:

- McCaughtry is the Warden at the Waupun Correctional Institution (WCI).
- Clements is the Security Director at WCI.
- O'Donovan is a Captain for Security at WCI.
- Dehaan was/is a Lieutenant and Captain for Security at WCI.
- Sullivan is a former Secretary of the DOC.
- O'Donnell was a Deputy Secretary at the DOC.
- Casperson is the former Warden of WCI and current Administrator of the Division of Adult Institutions at the DOC.
- Puckett is the Director of the Bureau of Offender Classification and Movement at the DOC.
- Schneiter is the Security Chief for the Division of Adult Institutions at the DOC.
- Douma is the Security Director at Columbia County Correctional Institution (CCI).

- Schwandt was the Administrative Captain at CCI.[3]

The remaining defendant, Swyers, is an Investigator for the Dodge County Sheriff's Office.

Heimermann initiated this action, brought under 42 U.S.C. §1983 as well as other state common law causes of action, with the filing of a 48-page complaint on May 14, 2004. The case was originally assigned to Judge Maryann Sumi. On June 29, 2004, the State Defendants filed a Notice of Removal to Federal Court. The next day, Swyers filed an Answer in which she asserted several affirmative defenses and requested dismissal of Heimermann's claims against her.

The United States District Court for the Eastern District of Wisconsin then issued a July 14, 2004 Order in which Judge William Griesbach dismissed Heimermann's suit. Judge Greisbach found that Heimermann was "effectively barred" from pursuing this case due to an [sic] Seventh Circuit Court sanction prohibiting him from filing any further actions until certain fines were paid. (R. 21:2-3.)[4]

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[3] The Complaint also lists other unknown State Defendants, *e.g.* John Doe and Richard Roe, who were employed by the DOC in various security positions.

[4] The only exception to the Seventh Circuit's prohibition appears to be criminal cases and habeas petitions *not challenging* Heimermann's 1991 conviction.

On September 24, 2004, Heimermann filed a Notice of Motion and Motion for Reinstatement of Case. Heimermann argued that the State Defendants had "defrauded" the state court "by not verifying the Seventh Circuit's restrictive filer order." (R. 24:4.) Heimermann requested that a June 30, 2004 judicial entry of dismissal be set aside and that the case be reinstated. Both Swyers and the State Defendants opposed the motion. (*See*, R. 29, 30.) After a hearing on the matter, Judge Sumi dismissed Heimermann's complaint with prejudice in a written order dated January 14, 2005. Heimermann then appealed Judge Sumi's decision to the Wisconsin Court of Appeals.[5]

On December 15, 2005, the Court of Appeals attempted to certify the following question to the Wisconsin Supreme Court:

> Simply put, the question is whether we have the authority to do what the State asks: does this court have the power to restrict future filings *in the circuit court?* May this court (or the circuit court) refuse to accept for filing a case because of unpaid sanctions in a different case in any state court? May this court or the circuit court refuse to accept for filing a case because of unpaid sanctions in federal court?

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[5] Actually, Heimermann appealed Judge Sumi's decision immediately after the hearing, but prior to the entry of her written order. (R. 42-1).

State ex rel. Heimermann v. McCaughtry, No. 2005AP87, 2005 WL 3434744, at *2 (Ct. App. Dec. 15, 2005). On February 27, 2006, the Wisconsin Supreme Court accepted certification from the Court of Appeals. *State ex rel. Heimermann v. McCaughtry,* 2006 WI 23, 289 Wis.2d 15, 712 N.W.2d 39 (Table). However, on June 14, 2006, the court reversed its decision, holding that "[b]ecause it appears that plaintiff-appellant remains unwilling to limit argument to the issue properly before the court, the certification was improvidently accepted in this case." *State ex rel. Heimermann v. McCaughtry,* No. 2005AP87, at *2 (June 14, 2006). The court then remanded the case to the Court of Appeals.

In an unpublished decision filed January 25, 2007, the Court of Appeals held:

> We conclude that the circuit court erred in relying on the doctrine of comity in refusing to reinstate Heimermann's case and in dismissing his complaint. Under the doctrine of comity, "courts will, as a matter of discretion, rather than obligation, defer to the assertion of jurisdiction or give effect to the judgments of other states or sovereigns out of mutual respect and for the purpose of furthering the orderly administration of justice." *Mills v. Vilas County Bd. of Adjustments,* 2003 WI App 66, ¶ 19, 261 Wis.2d 598, 660 N.W.2d 705, citing *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians,* 2000 WI 79, ¶ 35, 236 Wis.2d 384, 612 N.W.2d 709. Whether to

apply the doctrine of comity is committed to the circuit court's discretion. *Teague,* 236 Wis.2d 384, ¶ 35, 612 N.W.2d 709.

Here, the concurrent assertion of jurisdiction is not at issue. Instead, the issue is whether the circuit court properly gave effect to the federal court's judgment: that is, did the circuit court properly exercise its discretion when it refused to allow Heimermann to proceed *in a Wisconsin circuit court* based on a federal court sanction restricting his filing *in federal court?* We conclude that it did not. The circuit court did more than simply give effect to the federal court order barring Heimermann from federal court, it extended the scope of the federal court's order to encompass *future filings in the Wisconsin courts.* The parties do not provide us with any authority for using comity in this context. We conclude that the circuit court erroneously exercised its discretion in applying the doctrine of comity to bar Heimermann's filing.

We next address whether the circuit court's decision should be affirmed because Heimermann has failed to state a claim or because he is improperly attempting to relitigate a conviction that he has already challenged in several prior actions. We cannot resolve these questions based on the briefing before us. However, we note that Heimermann's complaint alleges conduct that relates to incidents that have occurred

> since he has been imprisoned and thus does not relate to his conviction.
>
> We also note that he has presented an argument in his briefs on appeal that his claim is cognizable under *Heck v. Humphrey,* 512 U.S. 477, 489, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The circuit court may take up these questions on remand. If the circuit court determines that Heimermann has failed to state a claim or that his complaint is frivolous, the circuit court may impose appropriate sanctions.

State ex rel. Heimermann v. McCaughtry, 2007 WI App. 34, ¶¶ 5-7,728 N.W.2d 373 (Table), 2007 WL 188898. The case was remanded to Judge Sumi; however, on March 12, 2007, Heimermann moved for substitution. The case was reassigned to Judge Sarah O'Brien on March 19, 2007 and further reassigned to this court on March 27, 2007.

On May 14, 2007, the State Defendants filed the pending motion to dismiss in part. This court has reviewed the parties' briefs on the State Defendant's motion and this Decision and Order addresses the same.

HEIMERMANN'S COMPLAINT

Heimermann's complaint contains allegations that reach back to 1991, when the criminal complaint in his underlying conviction was filed. The lengthy Complaint contains eleven numbered paragraphs in

the "CAUSES OF ACTION" section. Heimermann's brief, however, describes only eight:

> (1) contract-based claims against defendants Swyers, Dehaan, Casperson, O'Donnell, Sullivan and Doe **(Compl. at ¶¶ 52-57, 107-08);**
>
> (2) a ***Heck v. Humphrey*** claim against defendants Swyers, Dehaan, Casperson, O'Donnell, Sullivan and Doe **(Compl. at ¶¶52-57, 109);**
>
> (3) that defendants Swyers, Dehaan, Casperson, O'Donnell, Doe and Sullivan violated Soctt's [sic] due process rights to meaningful access to the courts **(Compl. at ¶¶96-106, 110-111);**
>
> (4) an affirmative failure-to-protect claim under §1983 against Swyers, Casperson, Puckett, Schneiter, McCaughtry, Clements, O'Donovan, Douma and Schwandt **(Compl. at ¶¶67, 69-70, 72-78, 84, 112-113);**
>
> (5) that defendants McCaughtry, Clements, O'Donovan, Douma and Schwandt retaliated against Scott for filing his internal grievances about his work and testimony in the Fecke et al. case by fabricating conduct reports and unjustly disciplining him **(Compl. at ¶¶50, 52-54, 60, 67-95, 114-115);**
>
> (6) that defendants Casperson, Puckett, Schneiter and O'Donnell condoned and ratified the unconstitutional retaliatory

> conduct of their subordinates since Scott's return from the custody of the Minnesota Department of Corrections on March 23, 2001 **(Compl. at ¶¶64, 72, 74-78, 84, 93-94, 114-115);**
>
> (7) that defendants McCaughtry, Clements, O'Donovan and Doe intentionally interfered with Scott's prospective contractual and business relations with attorneys, public elected officials and other outsiders about developing his patent into a viable business to be run outside the prison **(Compl. at ¶¶85-95, 116-117);** and
>
> (8) a "concerted action" within the meaning of Wis. Stat. §895.045(2) against Swyers for the combined injury caused by the state defendants.

(Heimermann Br., p. 5, emphasis in original.) Thus, seven of the eight causes of action involve the State Defendants. Briefly, those claims can be summarized as follows:

- *First Cause of Action:* Breach of contract claim against various State Defendants and Swyers based on Heimermann's alleged assistance in the investigation and prosecution of Robert Fecke (Fecke). Heimermann claims that certain State Defendants and Swyers made various promises to him in exchange for his assistance. (Compl. ¶52.) Heimermann alleges that he was offered immunity from further discipline on conduct report

912772 and that said conduct report was to be expunged from his prison record; that he was granted immunity from prosecution based on any evidence that might come to light during the investigation; that he was promised certain exculpatory information from a witness protection inmate, Edward J. Piscitello (Piscitello); and that he would be transferred to a minimum security facility until he was released from prison. (Id.) Based on these promises, Heimermann allegedly worked undercover on the Fecke investigation for nearly two months. (Compl. ¶53.) Heimermann claims that these promises, and his performance, led to an implied-in-law agreement that the State Defendants breached. (Compl. ¶108.) On a theory of quantum meruit, Heimermann argues that he should be compensated for the services he provided. (Compl. ¶107.)

- *Second Cause of Action:* A "Heck" claim under which Heimermann asserts that he has been denied substantive due process. (Compl. ¶109.) Relying on the same facts alleged in support of his breach of contract claim, Heimermann claims that certain State Defendants and Swyers have denied him substantive due process by denying him access to Piscitello. (Id.) Per Heimermann, "the missing ingredient" in his "release from

prison recipe" is Piscitello's "exculpatory" testimony. (Id.)

- *Third Cause of Action:* An access to courts claim under which Heimermann contends that certain State Defendants and Swyers perpetrated fraud upon the Outagamie County Circuit in 1999 and continue to condone his unlawful confinement thereby violating his substantive due process rights. (Compl. ¶¶96, 110-111.) Heimermann claims that certain State Defendants and Swyers prevented him from clearing his name during state habeas corpus proceedings in 1999. (Compl. ¶96.) Heimermann contends that the State Defendants and Swyers knew about Piscitello's exculpatory testimony and that Fecke was helping him obtain it, but withheld that information from the judge in his habeas proceeding. (Compl. ¶103.)
- *Fourth Cause of Action:* A failure to protect claim under §1983 against certain State Defendants and Swyers based on their failure to keep Heimermann out of general population status. (Compl. ¶112.) Heimermann claims that, as a result of his assistance in the Fecke investigation, he is labeled a "snitch". (Compl. ¶112.) He argues that their deliberate indifference to his safety is a violation of his Eighth and Fourteenth Amendment rights. (Compl. ¶113.)

- *Fifth & Sixth Causes of Action:* Two claims of retaliatory conduct by State Defendants against Heimermann. (Compl. ¶¶96, 114-115.) In the first, Heimermann argues that certain State Defendants subjected him to "systemic discipline and prison transfer" in retaliation for his well-known litigation activities thereby violating the First, Eighth and Fourteenth Amendments. (Compl. ¶114.) In the second, Heimermann claims that the conduct reports and resulting periods of solitary confinement were "unrelated to prison security of discipline and were calculated to harass and intimidate plaintiff," thereby violating his Eighth and Fourteenth Amendment rights. (Compl. ¶115.)
- *Seventh Cause of Action:* An intentional interference with contract and business relations claim against certain State Defendants. (Compl. ¶¶116-17.) Heimermann claims that the CCI Librarian confiscated various documents related to his "ongoing real estate and finance business" and pending patent. (Compl. ¶86.) Heimermann alleges that these documents were part of his attempts to obtain outside legal counsel. (Id.) He further claims that these documents were then used as evidence in disciplinary actions against him. (Compl. ¶¶88-89, 92, 94-95.) Heimermann contends that the State Defendants violated his First and Fourteenth Amendment

rights by interfering with his pending patent application. (Compl. ¶116.) In addition, he claims that his Fourteenth Amendment rights were violated by State Defendants interference with his "lawfully established businesses." (Compl. ¶117.)

DISCUSSION

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." *Weber v. City of Cedarburg,* 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Only those allegations made within the complaint are relevant to the court's decision. *Id.* The court must accept the facts stated in the complaint, and the reasonable inferences that may be drawn from them, as true. *Friends of Kenwood v. Green,* 2000 WI App 217, ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271. In addition, the court may look to any document attached to the complaint and made part thereof. *Id.*

"A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." *Watts v. Watts,* 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987).

The State Defendants argue that Heimermann's "Heck" and "Access to Courts" claims are barred by *Heck v. Humphrey,* 512 U.S. 477 (1994). In addition, they claim that he failed to exhaust his

administrative remedies with respect to his "Contract" and "Retaliation" claims. While the State Defendants have not moved to dismiss Heimermann's "Failure to Protect" claim, they reserve the right to do so in the future. In addition, they argue that the portion of his "Interference with Business" argument based on due process fails to state a claim upon which relief may be granted; however, they do not move to dismiss the portion of the claim based on the First Amendment, but reserve that right for future motions. Finally, the State Defendants argue that Heimermann's complaint does not allege violations of either the WOCCA or RICO; therefore, he should not be allowed to proceed with those claims.

I. CONTRACT CLAIMS

"A unilateral contract will be legally enforceable when it has induced substantial performance or when it has brought about a change of position on the part of the offeree." *Lazarus v. American Motors,* 21 Wis. 2d 76, 83, 123 N.W.2d 548 (1963). In the instant action, Heimermann argues that his assistance in the Fecke investigation resulted in a legally binding unilateral contract between himself and certain State Defendants. Based on the existence of this alleged contract, Heimermann contends that he is entitled to compensation; i.e. "transfer to a minimum security facility and the information supporting his factual innocence that he bargained for, earned and did not receive." (6/12/07Heimermann Br. P. 6.) Heimermann, however, may not proceed with this cause of action

because he has failed to exhaust his administrative remedies regarding this claim.

Wisconsin Statutes provide:

> [n]o prisoner may commence a civil action . . . with respect to the prison or jail conditions in the facility in which he or she is or has been incarcerated, imprisoned or detained until the person has exhausted all available administrative remedies that the department of corrections has promulgated by rule. . . .

§801.02(7)(b) Wis. Stats.

Chapter DOC 310 of Wisconsin's Administrative Code outlines the administrative remedies available to Wisconsin inmates. Section DOC 310.05 of that chapter similarly states:

> [b]efore an inmate may commence a civil action . . . against any officer, employee or agent of the department in the officer's, employee's or agent's official or individual capacity for acts or omissions committed while carrying out that person's duties as an officer, employee or agent or while acting within the scope of the person's office, the inmate shall exhaust all administrative remedies that the department of corrections has promulgated by rule.

Wis. Admin. Code § DOC 310.05.

In applying § DOC 310.05, the Wisconsin Court of Appeals has noted that when an inmate complaint

is rejected as untimely, the inmate has failed to exhaust his or her administrative remedies. *State ex rel. Laurich v. Litscher,* 2004 WI App 150, ¶9, 275 Wis. 2d 769, 686 N.W.2d 668.

On August 27, 2003, Heimermann filed complaint number WCI-2003-29004, in which he alleged that certain State Defendants failed "to comply with the terms and conditions of an implied-in-law agreement for obtaining services in the apprehension and convictions of former prison guards. . . ." (Murphy Aff., Ex. 5, p. 7.) Heimermann alleged that his performance under that agreement ended "on or about June 27, 2000," and that, since then, he had made several demands for the services agreed upon under the agreement, but those services had not been provided. (Murphy Aff., Ex. 5, p. 8.) However, complaint number WCI-2003-29004 was rejected as untimely under § DOC 310.09(6).[6] (Murphy Aff., Ex. 5, p. 2.)

Based on this rejection, the State Defendants now argue that Heimermann's contract claims should be dismissed for failure to exhaust. In response, Heimermann claims that his complaint fell under the "good cause" exception of § DOC 310.09(6) and that the complaint examiner failed to properly investigate

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[6] Wis. Admin. Code § DOC 310.09(6) provides: An inmate shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may except a late complaint for good cause.

that cause. Due to this alleged failure, Heimermann argues that the State Defendants cannot claim that he failed to exhaust his administrative remedies. Heimermann, however, has waived this argument.

"If an inmate believes there are facts constituting 'good cause,' he or she must advise the institution complaint examiner by means of including the asserted facts in the complaint." *State ex rel. Laurich*, 2004 WI App 150, ¶15. "The failure to reasonably apprise the institution complaint examiner, by means of the complaint itself, of the facts the inmate believes constitute 'good cause' waives the inmate's right to later complain that his or her complaint should have been accepted later for 'good cause'". *Id.* Contrary to Heimermann's assertion, his offender complaint *did not* put the examiner on notice of his "good cause" exception. (Murphy Aff., Ex. 5, p. 7-8.) Rather, he waited until his complaint was rejected as untimely before asserting a factual basis for application of the good cause exception. (Murphy Aff., Ex. 5, pp. 36-38.) Heimermann has thus waived this argument; therefore, the court holds that Heimermann failed to exhaust his administrative remedies and finds that his contract claims must be dismissed.[7]

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[7] In an alternative, undeveloped argument, Heimermann also asserts that no administrative remedies were available to him on his contract claims. However, the court need not address this argument because Wis. Admin. Code § DOC 310.01(2)(a) makes clear that the inmate complaint review system is meant to address conduct of the type alleged here.

II. *"HECK"* CLAIM

The Civil Rights Act, §1983, states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1983. Thus, "[i]In [sic] order to state a claim under §1983 a plaintiff must allege: (1) that defendants deprived him of a federal constitutional right; and (2) that the defendants acted under the color of state law." *Savory v. Lyons,* 469 F.3d 667, 670 (7th Cir. 2006).

While the United States Supreme Court has described §1983 as a broad, general statute, the Court has chosen to limit its applicability in actions where the specific language of the federal habeas corpus statute would also apply. *Preiser v. Rodriguez,* 411 U.S. 475, 489 & 500 (1973). As such, in *Prieser,* the Court held that:

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Id. at 500.

In *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994), the Court further explained:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been

> invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

In summarizing the *Preiser* and *Heck* line of cases, the Court recently stated:

> [t]hese cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005).

In the case at bar, Heimermann alleges that certain State Defendants have denied him access to exculpatory testimony. As such, he seeks " . . . evidence to demonstrate his factual innocence." (Heimermann Br., p. 7.) Heimermann himself concedes that this claim is susceptible to the *Heck* analysis, but argues that "this suit is not, and should not be construed as, an action to question the validity of his conviction or sentence." (Id.) Not surprisingly, the State Defendants disagree.

The Seventh Circuit Court of Appeals recently stated "[s]pecial attention . . . must be given to the

manner in which the plaintiff frames his complaint, and the consequences that would follow from a favorable disposition." *Savory,* 469 F.3d at 672. Looking to the factual allegations cited in support of this claim, Heimermann's phrasing of the cause of action and the fourth paragraph of his "Prayer for Relief", the court finds that Heimermann is seeking exculpatory testimony, which would necessarily call into question the validity of his underlying conviction. (Compl. ¶¶52-57, 109; p. 47.) He is not asking for evidence that may or may not result in his release, he is asking for *exculpatory* testimony that is "the missing ingredient to [his] release from prison recipe." (Id. ¶109.) In essence, Heimermann is challenging the very fact of his imprisonment. As such, this court finds that Heimermann's "Heck" claim is barred and should be dismissed.

III. ACCESS TO COURTS CLAIM

Under the due process clause, prisoners have a constitutional right of meaningful access to the courts. *Bounds v. Smith,* 430 U.S. 817, 822 (1977). In his third cause of action, Heimermann alleges that certain State Defendants violated this right during a 1999 habeas proceeding by withholding information from the judge. Specifically, that State Defendants withheld information regarding Piscitello's exculpatory testimony, which hampered his ability to prove his factual innocence. Heimermann's claim, however, is not cognizable under §1983.

As with his "Heck" claim, Heimermann's access to courts claim seeks exculpatory testimony, which would necessarily call into question the validity of his underlying conviction. Because this third cause of action challenges the very fact of imprisonment, it is barred by *Heck*; therefore, Heimermann's access to courts claim is dismissed.

IV. FAILURE TO PROTECT CLAIM

The State Defendants do not, at this time, seek dismissal of Heimermann's failure to protect claim, but reserve their right to do so in the future; therefore, the court will not address the issue at this juncture.

V. RETALIATION CLAIMS

"Prisoners are entitled to utilize available grievance procedures without threat of recrimination. . . ." *Hoskins v. Lenear* 395 F.3d 372 (7th Cir. 2005) (internal citation omitted). In his fifth and sixth causes of action, Heimermann alleges that certain State Defendants subjected him to "systemic discipline and prison transfer" because of his litigation activities and that the resulting conduct reports and periods of solitary confinement violated his Eighth and Fourteenth Amendment rights. (Compl. ¶¶114-15.) However, as with his contract claims, Heimermann has failed to exhaust his administrative remedies on his retaliation claims.

The State Defendants argue that the only offender complaint in which Heimermann raised issues of retaliation is complaint number WCI-2003-39925. (Murphy Aff., Ex. 8.) The complaint examiner rejected that complaint as untimely under Wis. Admin. Code § DOC 310.11(5)(d).[8] (Murphy Aff., Ex. 7, p. 2.) Based on this rejection, the State Defendants claim that Heimermann failed to exhaust his administrative remedies.

Heimermann, however, claims that he was not required to file an offender complaint because the complaint in *this action* gave the State Defendants sufficient notice of his claims against them. Heimermann confuses the law regarding sufficiency of pleading with that of administrative exhaustion. While it is true that his complaint need only specify the bare minimum of facts necessary to put the State Defendants on notice of his claims in this action, Heimermann must still satisfy Wisconsin's administrative exhaustion requirements.

As noted above, when an inmate complaint is rejected as untimely, the inmate has failed to exhaust his or her administrative remedies. *State ex rel.*

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[8] Wis. Admin. Code § DOC 310.11(5)(d) provides:

(5) The ICE may reject a complaint for the following reasons:

(d) The inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the ICE to extend the time limits.

Laurich, 2004 WI App 150, ¶9. Because Heimermann failed to do so with respect to his retaliation claims, those claims must be dismissed.

VI. INTERFERENCE WITH BUSINESS CLAIMS

A. First Amendment Rights

The State Defendants do not, at this time, seek dismissal of Heimermann's claim that his first amendment rights were violated by certain State Defendants alleged interference with his business communications. As such, the court does not address the issue at this juncture.

B. Due Process Rights

"The procedural guarantees of the Due Process Clause apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Taplick v. City of Madison Personnel Bd.,* 97 Wis. 2d 162, 169, 293 N.W.2d 173 (1980). Therefore, to determine whether the requirements of the Due Process Clause apply, a court must first look to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 570-71 (1972).

In the instant action, Heimermann appears to argue that he has both a property and liberty interest in "his communications with outsiders about his lawfully established businesses. . . ." (Heimermann Br., p. 11.) However, after reviewing Heimermann's

complaint, this court finds no allegations describing a deprivation of either a property or liberty interest.

First of all, "[ ]though an individual does not lose all his constitutional rights upon being imprisoned, his rights are clearly circumscribed." *Secret v. Brierton,* 584 F. 2d 823, 829 (7th Cir. 1978) (internal citation omitted). As such, "one's right to possess personal property is severely diminished upon imprisonment." *Id.* at 830. Secondly, "[p]roperty interests are not created by the Constitution; they are created and defined by existing rules or mutually explicit understandings that stem from an independent source such as state laws, ordinances or an implied contract that secure certain benefits and support claims of entitlement to those benefits." *Taplick,* 97 Wis. 2d at 170 (internal citation omitted).

Third, Wis. Admin. Code. § DOC 303.32(1) prohibits inmates from engaging in "a business or enterprise" except for in limited circumstances not applicable here.[9] However, even if this court were to

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[9] Wis. Admin. Code § DOC 303.32(1) provides:

> (1) Any inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offense, except for the following situation
>
> (a) An inmate who was owner or part owner of any business or enterprise prior to sentencing may communicate with the inmate's manager or partner concerning the management of the enterprise or business.

(Continued on following page)

find one of these exceptions applicable, the Wisconsin Court of Appeals has previously held that "prison administrative rules are not enacted for the benefit of individual inmates and do not create any liberty or property interests." *Richards v. Cullen,* 152 Wis. 2d 710, 713, 449 N.W.2d 318 (Ct. App. 1989). Heimermann has thus failed to identify the source of any property interest of which he was allegedly deprived.

Heimermann, however, also claims to have a liberty interest at stake. Citing *Procunier v. Martinez,* 416 U.S. 396, 418 (1974); in which the United State [sic] Supreme Court noted that prisoners have a liberty interest in uncensored communication by letter, Heimermann argues that he has a liberty interest in unfettered communications with outsiders. What Heimermann fails to address is the Court's proviso that even this liberty interest is "qualified of necessity by the circumstance of imprisonment." *Id.* Nor does he claim that the State Defendants violated any of the various procedures under which the Court found that a prisoner's mail may be censored. *See, Id.* at 418-419. Thus, Heimermann has also failed to allege any deprivation of a liberty interest.

In short, Heimermann's complaint contains no allegations of any deprivation of either a liberty or

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(b) An inmate may write and seek publication of works in accordance with these rules and institutional policies and procedures.

property interest subject to the procedural guarantees of the Due Process Clause. As such, he has failed to state a due process claim against the State Defendants. For these reasons, the court finds that his interference with business claims grounded in due process should be dismissed.

VII. ORGANIZED CRIME AND RACKETEERING CLAIMS

In his brief, Heimermann alleges that certain unspecified State Defendants violated the WOCCA and RICO.[10] (Heimermann Br., p. 12.) Specifically, that these State Defendants' interference with his prospective business and contractual relations violated both acts. However, his complaint fails to allege violations of either provision and thus failed to provide the State Defendants with sufficient notice of such claims. As such, the court holds that Heimermann may not proceed with these claims at this time.

CONCLUSION

As Heimermann failed to exhaust his administrative remedies with respect to his contract claim, his contract claims against the State Defendants are DISMISSED. Similarly, Heimermann failed to exhaust his administrative remedies with respect to

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[10] Heimermann contends that these claims were included in various submissions to this court in April of 2007. (Heimermann Br., p. 12.)

his two retaliation claims, thus both retaliation claims against the State Defendants are also DISMISSED.

Because Heimermann is challenging the very fact of his imprisonment, the court finds that his "Heck" claim is barred. As such, Heimermann's "Heck" claim against the State Defendants is also DISMISSED. Heimermann's access to courts claims also challenges the very fact of imprisonment; therefore, it is likewise barred by *Heck* and also DISMISSED.

Heimermann's complaint contains no allegations of any deprivation of either a liberty or property interest subject to the procedural guarantees of the Due Process Clause. As such, he has failed to state a due process claim against the State Defendants and his interference with business claims grounded in due process are DISMISSED.

Finally, because Heimermann's complaint does not contain allegations regarding any violation of either the WOCCA or RICO laws, Heimermann may not proceed on those claims at this time. Thus, only Heimermann's failure-to-protect and First Amendment based business claims against the State Defendants remain.

This Decision and Order is not a final order that disposes of the entire matter in litigation as to any party and *is not intended by the court to be an appealable order within the meaning of sec. 808.03(1), Wis. Stats.*

IT IS SO ORDERED by the Court this 27th day of September, 2007.

/s/ David T. Flanagan
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

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(3)

No. 09-334

Supreme Court, U.S.
FILED
OCT 27 2009
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In The
Supreme Court of the United States

STATE OF WISCONSIN EX REL.,
SCOTT A. HEIMERMANN,
Petitioner,

v.

JOANNE SWYERS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Wisconsin District IV

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In urging this Court to refuse to hear the injustice in Petitioner Scott Alan Heimermann's case, Respondent Joanne Swyers emphasizes her reasons for why she should freely be allowed to trample on Heimermann's Constitutional rights. In her Response Brief to this Court, Swyers argues that Heimermann "no longer couches the evidence sought in terms of Piscitello's allegedly exculpatory testimony. This may be owing to Petitioner's acknowledgment that he obtained and presented to more than one reviewing court multiple affidavits by Piscitello but was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison." (Swyers' Response Brief at 9.) Swyers also claims "[w]hat Petitioner essentially requests is that this Court provide him with additional post-conviction access to the courts". (Swyers' Response Brief at 20.) In this view, Swyers apparently thinks that since Heimermann was eventually able to get a hold of "multiple affidavits" from Piscitello *after* 1999, and at the same time had access to post-1999 postconviction and habeas courts, even though those courts those courts never allowed discovery or an evidentiary hearing to prove Heimermann's substantive claims, that Swyers is somehow liability proof under ***Heck v. Humphrey*** for her reckless and callous indifference to Heimermann's Constitutional right prior to and during

the 1999 habeas corpus proceeding in state court.[1] That is nonsense.

ARGUMENT

At the state level, Swyers acknowledges that Heimermann made two arguments that are now part of debate in this Court. These arguments were (1) that Heimermann had a right under the Fourteenth amendment's Due Process Clause to obtain access to the exculpatory information from informer Piscitello; and (2) that Respondents had intentionally blocked him adequate access to a 1999 habeas corpus proceeding in state court on Respondents' intentional

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[1] Swyers also touts the 'as-yet-undisclosed state evidence' as "problematic for a number of reasons". According to Swyers, "[t]hese records are not subject of Petitioner's Complaint allegations or claims against Respondent nor were these claims addressed by the court below." (Swyers' Response Brief at 9.) However, following Piscitello's alleged death in September 2006, warranted Heimermann filing a motion in the Dane County Circuit Court to compel the release of the as- yet-undisclosed state evidence on February 5, 2007. (Pet. for writ of cert. at 18.) This motion was premised on the Respondents denying Heimermann access to the exculpatory information from Piscitello, hence in light of Piscitello dying before his testimony could be utilized at an evidentiary hearing in court, Heimermann argued in his Petition that the Respondents should be required to replace Piscitello's testimony with the as-yet-undisclosed state evidence via a court order for injunctive relief for which Heimermann also requested in his sworn complaint (see Complaint at p. 47), to remedy the injury resulting from the Respondents' violation of Heimermann's postconviction right to access the exculpatory information from Piscitello. (Pet. for writ of cert. at 13-14, 18, 29.) *See* e.g., ***Edwards v. Balisok***, 520 U.S. 641, 648-49 (1997). So contrary to Swyers' argument, Heimermann did in fact present the analysis of this claim in the courts below and in his sworn complaint.

failure to find Piscitello on behalf of Heimermann like they agreed to do. (App. to pet. for writ of cert. at 7a-8a, 26a-27a: R. App. 9a, 11a-12a.) Now in her Response Brief Swyers contends that Heimermann abandoned the first claim in his Petition. (Swyers' Response Brief at 9.) While the two issues vary, Heimermann did not abandon the first claim in his Petition. The common theme is that they both stem from the Respondents repeatedly denying Heimermann access to the exculpatory information from Piscitello in 1999 when Heimermann had a pending substantive habeas claim for which this exculpatory evidence was material and that the Wisconsin courts denied both claims solely on the basis of ***Heck v. Humphrey,*** 512 U.S. 477 (1994). (App. to pet. for writ of cert. at 7a-8a, 26a-27a: R. App. 9a, 11a-12a.) Therefore, this Reply Brief will only address the new points Swyers raised in her Response regarding the alleged abandonment of the due process right to exculpatory information of Piscitello claim. Because the remaining points in Swyers Response present no special reason, justifying a reply, Heimermann respectfully incorporates in this Reply Brief by reference those arguments in his petition for writ of certiorari.

I. THE WISCONSIN COURTS' CONCLUSIONS CONFLICT WITH THE DECISIONS OF THIS COURT AND ITS PROGENY.

Swyers' argument on Heimermann's due process right to exculpatory postconviction evidence claims is that he has not demonstrated a conflict between this Court's precedent and the decisions of the Wisconsin Court of Appeals. (Swyers Response Brief at 12-15.) According to Swyers, Heimermann "mischaracterizes

the holding and applicability" of this Court's holding in **District Attorney's Office For The Third Jud. Dist. v. Osborne**, __ U.S. __, 129 S. Ct. 2308, 2009 U.S. LEXIS 4536 (2009). (Swyers' Response Brief at 14.) Contrary to Swyers' argument, however, Osborne and its progeny did not rule that a prisoner's postconviction access-to-evidence claim brought under § 1983 is barred under ***Heck***. 129 S. Ct. at 2318-19. While Swyers is correct in saying that ***Osborne*** disallowed a substantive and procedural due process right to exculpatory evidence, the question thus was "whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Id.* (quoting ***Medina v. California***, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)). This Court ultimately concluded that Osborne was not able "to demonstrate the inadequacy of the state-law procedure available to him in state postconviction relief," hence he had not shown a due process violation. 129 S. Ct, at 2321-22.

On the other hand, the United States District Court for the Southern District of New York recently allowed a claim substantially identical to Heimermann's in ***Newton v. City of New York***, 2009 U.S. Dist. LEXIS 95346 (S.D.N.Y. Oct. 13, 2009). ***Newton*** recognized that its analysis did not directly contradict Osborne. The exclusive rationale of the ***Newton*** holding is to ensure that, "once a state determines that a postconviction defendant is entitled to evidence under [the framework of the state's postconviction procedures], the defendant's due process rights have

been violated if attempts to locate the evidence are unsuccessful due to inadequate training, supervision, and instruction in the procedures necessary to locate the evidence or deliberate ignorance of the storage location in bad faith." *See* 2009 U.S. Dist. LEXIS 95346 at * 43. Thus, Heimermann points to **Newton** as on point to show that Swyers' denying him access to exculpatory evidence in 1999 "transgress principles of fundamental fairness in operation," hence **Osborne** is applicable for Heimermann's postconviction access to evidence claim.

Like ***Newton***, Heimermann's case and ***Osborne*** reflect big factual differences. In ***Osborne***, the plaintiff failed to show he was denied a fair trial and he failed to pursue Alaska's postconviction procedures to access the requested exculpatory evidence. Heimermann has shown how he was denied a fair trial, i.e., wholesale suppression of exculpatory evidence by the state, and he has repeatedly pursued Wisconsin's procedures (in various ways) and has shown them to be a repetitive exercise of futility. So applying ***Newton*** and ***Osborne*** to Heimermann's postconviction access to exculpatory evidence claims are supportive to his case. First, for Heimermann to be able to state a claim for due process violation relating to the exculpatory information from Piscitello, he must show (1) the existence of a protected liberty interest and (2) that Wisconsin's procedures for protecting that interest violate a fundamental principle of justice or are fundamentally unfair. In his petition for writ of certiorari, Heimermann has shown that he has a liberty interest, i.e., that Wisconsin state law provides a right comparable to that in Alaska to be released upon an invalid conviction based on newly discovered evidence. *See generally* Wis. Stat. § 782.01 (providing

for discharge from custody upon petition for writ of habeas corpus when there is no legal cause for petitioner's imprisonment or restraint). (Pet. for writ of cert. at 19- 20.) In addition, Heimermann has a right to postconviction access to evidence in Wisconsin pursuant to ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W. 2d 8 (1999). (Pet. for writ of cert. at 14-15.)

The second thing Heimermann must show is that the consideration of his claim within the framework of Wisconsin's postconviction access procedures "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *See* 129 S. Ct. at 2320 (citation omitted). As shown below, Heimermann has raised a question of material fact as to whether Wisconsin's procedures for postconviction access to evidence, combined with Swyers denying him access to exculpatory information from Piscitello in 1999 for invalidating his 1991 convictions, "transgress principles of fundamental in operation".

Heimermann -- like in **Newton** -- raises a material question of fact as to whether the exculpatory information from Piscitello and the "as-yet-undisclosed state evidence" could have been obtained because the Respondents failed to follow through with their promises to help Heimermann find Piscitello in 1998 so that Heimermann could have used that exculpatory information in time during a 1999 habeas corpus proceeding in state-court.

Heimermann had an ongoing due process claim that triggered the postconviction discovery concerns he has raised in his Petition. On February 12, 1999,

Swyers was called to testify under oath in ***State of Wisconsin ex rel. Scott A. Heimermann v. Bradley G. Gehring***, Outagamie County Circuit Court, State of Wisconsin, and case No. 99-CV-72, a state-court habeas corpus action commenced by Heimermann. (the "1999 state habeas corpus case"). The state-court asked Swyers about her role in promising to find Piscitello and obtain exculpatory information from Piscitello regarding Heimermann's innocence:

> "SWYERS: I do want to add there was one thing I agreed to do for him.
>
> THE COURT: What was that?
>
> SWYERS: He was trying desperately to locate an inmate by the name of Piscitello who was his co-defendant in is convictions, and he was a protected federal witness, and he was looking for that location, and I did agree, he wanted me to ask the U.S. Attorney if there was a way he could get an affidavit from Mr. Piscitello and I asked the U.S. Attorney, and she was not interested in pursuing that."

(Habeas hearing transcript, Feb. 12, 1999 at 13-14.)

Heimermann then went on to cross-examine Swyers:

"HEIMERMANN: Okay. Did there ever come a time in my capacity of assisting you and the others where you were presented with documentation concerning my protestations of innocence in the criminal matter?

SWYERS: Yes. You inundated me with documents about that matter."

(Habeas hearing transcript, Feb. 12, 1999 at 15-16.)

A few minutes later during the 1999 state habeas corpus case Heimermann asked Swyers about the underlying promises she and her state confederates made with him to help in the Robert Fecke et al. investigations and with finding Piscitello:

"HEIMERMANN: Ms. Swyers, did I or did I not assist in buy money and giving it to the perpetrators in this case, Mr. Fecke, where he then took the money out of the institution and presented it to my Mother? Was hat not part of the deal?

SWYERS: Was that not part of what?

THE COURT: The deal.

HEIMERMANN: The deal.

SWYERS: Yes.

HEIMERMANN: Other than what you had requested for me to do, there was no other matters for me to do, correct?

SWYERS: Yes, there was.

HEIMERMANN: And in what regard?

SWYERS: After the money was accepted the guard [Fecke] was supposed to provide you with a phone number, a name, and address to use to contact him through, and that was Mr. Patzer, and you were supposed to arrange a meeting between Mr. Patzer and the undercover DEA agent, at which time you revealed our investigation to Mr. Patzer and ended our investigation.

HEIMERMANN: How did I reveal your investigation? Let me back up. Did I provide you the number for Mr. Patzer?

SWYERS: Yes."

(Habeas hearing transcript, Feb. 12, 1999 at 19-20.)

Swyers did not mention the existence of "Mr. Patzer" being the sole Plaintiff in ***Thomas R. Patzer v. State of Wisconsin Department of Corrections and Dodge County Sheriffs Department***, Dodge County Circuit Court, State of Wisconsin, case no. 98-SC-811, a state-court small claims actions against Swyers and her state counterparts. There, Mr. Patzer alleged under oath in his civil complaint that:

> "On July 3, 1998, your Plaintiff was retained by Robert Fecke on behalf of Scott A. Heimermann for investigative services in conjunction to Mr. Heimermann's appeal from a criminal conviction. On July 14, 1998, your Plaintiff entered into a written contract with Mr. Heimermann for investigative services to be rendered at $40.00 per hour, plus all out-of-pocket expenses .... In his capacity as an 'confidential informant' [at the time Mr. Heimermann entered into the written contract with your claimant; said signing of said contract was predicate to the carrying out of [Respondent] Dehann and Swyers' overall objective against the Plaintiff."

(Patzer sworn civil complaint at ¶¶2,9.) Thus the fact that Swyers and Respondent Dehaan had persuaded Heimermann to retain Patzer *on the pretext* as a private investigator in Heimermann's efforts to find Piscitello during the undercover investigation of Fecke et al. and at the same time Swyers monitoring every move of Patzer via Heimermann's undercover services in that investigation raises a meritorious claim that Swyers and her state confederates knew all along of

Patzer ultimately determining Piscitello to be somewhere in "the State of Florida Department of Corrections system via Inter-State transfer from Wisconsin Department of Corrections system on April 3, 1996,"[2] but at the same time Wisconsin corrections had denied Patzer access to Piscitello's true location in Florida on account of his witness protection status, hence Swyers recklessly and callously denied Heimermann access to Piscitello for the 1999 habeas corpus proceeding in state court.

Therefore, contrary to Swyers, this case is wholly distinguishable from the factual circumstances in ***Osborne:*** Here, over a decade ago, Heimermann repeatedly requested postconviction access to information from longtime informer Piscitello and for which that information was denied -- not because the courts said Heimermann wasn't entitled to the exculpatory information of Piscitello, but because Swyers reneged on promises to aid Heimermann in finding Piscitello and obtain exculpatory information from him in 1998. As it turns out, Piscitello was always in a location within the custody of the Respondents at the time which Swyers and State Respondents agreed to help Heimermann find Piscitello -- even telling the 1999 state-habeas court she couldn't locate Piscitello because the "U.S. Attorney was not interested in pursing that."

Translation: Basically, Swyers' "the U.S. Attorney was not interested in pursuing that" statement means that Swyers hew all along of Piscitello's location but at

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[2] 1664: App to pet. for writ of habeas corpus 42. Note see meaning of prefix "1664" in Heimermann's Petition at 4, n.4.

the same time was deliberately indifferent of the location of Piscitello and in helping Heimermann clear his name in a crime he did not morally and technically commit. Without accurate information of Piscitello's location and his exculpatory information against Milwaukee law enforcement and prosecutors, including the 'as-yet-undisclosed state evidence' Heimermann was unable to prove "that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann"[3] at the 1999 state habeas corpus case, hence Swyers and State Respondents are seeking to keep an innocent man in prison. *See* Dan Markel, *DA's Office* v. Osborne: Bad Facts Make Tough Cases, Prawfsblawg, June 19, 2009, http://prawfsblawg.blogs.com/prawfsblawg/2009/06/das-office-v-osborne-bad-facts-make-though-cases-html (arguing that lower courts and the Supreme Court in future cases can reasonable restrict Osborne's holding to situations in which there is strong evidence of strategic manipulation by litigants; *the holding need not naturally extend to those cases where the defendant's claim of actual innocence are more plausible than Osborne's claims were*).

Since Heimermann raises a question of material fact as to whether Wisconsin's procedures for postconviction access to exculpatory evidence, combined with Swyers' denying Heimermann access to exculpatory evidence, it "transgresses [a] principle of fundamental fairness in operation." So read in the context of ***Newton*** and ***Osborne***, a conflict clearly exists between this Court's precedent and the decisions

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[3] *See* Heimermann's pet. for writ of cert. at 19.

of the Wisconsin courts barring Heimermann access to exculpatory postconviction evidence under ***Heck***.[4]

CONCLUSION

For the reasons state above, Scott Alan Heimermann respectfully requests that this Court grant the petition for writ of certiorari and order that the injustice in this case be rectified at long last.

Respectfully submitted,

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Petitioner pro se

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[4] Swyers, who is apparently making an attempt to dodge this Court's holding in ***Edwards v. Balisok***, 520 U.S. 641 (1997), also argues to this Court that Heimermann failed to seek any form of injunctive relief in his complaint. (Swyers' Response Brief at 16.) This statement of Swyers is not true. Heimermann's sworn complaint plainly requested the court to "immediately issue a temporary restraining order directing to depose Edward J. Piscitello as soon as possible because his testimony is cretical to Plaintiff being released . . . ." (Complaint at p.47.) Because Heimermann did request injunctive relief in his complaint, combined with the fact that the Wisconsin courts denied Heimermann's claims under ***Heck***, demonstrates also that Heimermann has shown a conflict between the Wisconsin courts' decisions and this Court's holding of ***Edwards v. Balisok***, 520 U.S. at 648-49. *See also Introduction Section, supra*, at 1, n.1.

PETITION FOR RE-HEARING

No. 09-334

In The
Supreme Court Of The United States

SCOTT A. HEIMERMANN,

Petitioner

Vs.

GARY R. McCAUGHTRY, ET AL.

Respondents

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN DISTRICT IV

PETITIONER'S PETITION FOR REHEARING

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INTRODUCTION

This Court denied Petitioner Scott A. Heimermann's ("Heimermann") Petition for Writ of Certiorari("Petition") on November 2, 2009, 2009 U.S. LEXIS 7747, 78 U.S.L.W. 3251, and he now respectfully petitions for rehearing of that order denying certiorari. Specifically, Heimermann asks for an order (1) granting rehearing and (2) remanding the case to the Court of Appeals of Wisconsin District IV. If the Court is unwilling to remand the case for better development of the record as to whether Heimermann's unsuccessful postconviction litigation history is owing to Respondents' cover-up of alleged Fourteenth Amendment violations and on the nature of the Wisconsin Court of Appeals affirming dismissal of Heimermann's sworn civil rights complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477, 114 S. Ct. 2364 (1994), with prejudice, Heimermann would alternatively request that the Court grant certiorari and set this case on the Court's docket for argument and briefing so that it can resolve the Questions Presented.

Because Supreme Court Rule 29.4 and 28 U.S.C. § 2403(a) may apply, the Solicitor General of the United States has been served with this petition.[1]

GROUNDS FOR REHEARING

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Supreme Court Rule 44.2. This most extraordinary relief will not be granted unless there is a "reasonable likelihood of this Court's reversing its previous decision and granting certiorari." ***Richmond v. Arizona***, 434 U.S. 1323, 98 S. Ct. 8 (1977)(Rehnquist, J., in Chambers).

[1] The Solicitor General had also been served with Heimermann's Petition for Writ of Certiorari and Reply Brief in this case.

In arguing for rehearing, Heimermann points to three areas: (1) the Court of Appeals of Wisconsin improperly affirmed dismissal of Heimermann's sworn civil rights complaint, pursuant to ***Heck***, with prejudice; (2) the Court of Appeals of Wisconsin improperly endorsed the application of the ***Heck*** rule without first commencing fact-finding as a prerequisite on whether Heimermann's unsuccessful postconviction litigation is due to Respondents' cover-up of alleged Fourteenth Amendment violations relating to Heimermann's 1991 convictions;[2] and (3) extraordinary relief is warranted pursuant ***In Re Davis***, 174 L. Ed. 2d 614, 2009 U.S. LEXIS 5037 (2009). Heimermann therefore respectfully, and humbly, submits that rehearing is warranted.

I. REHEARING IS WARRANTED IN LIGHT OF THE FACT THAT THE PROPER ROLES OF COURTS IN CASES ON *HECK* GROUNDS WARRANT ONLY DISMISSAL WITHOUT PREJUDICE.

The Wisconsin circuit court dismissed Heimermann's sworn civil rights complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477, 114 S. Ct. 2364 (1994), with prejudice. (Petitioner's Appendix [P. App.] at 31a.) Likewise, the Wisconsin Court of Appeals concluded that dismissal with prejudice was warranted in Heimermann's case. (P. App. at 2a.)

The proper roles of courts in cases on *Heck* grounds, however, warrant only dismissal *without* prejudice because the suit may be reinstated should the prisoner's

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[2] The Fourteenth Amendment violations are based on Respondents' official cover-up of exculpatory information during a 1999 habeas corpus proceeding in state court where the basics of that exculpatory information eventually showed a concerted effort by Milwaukee police detectives Barry Debraska Jr. and Brian O'Keefe, along with their longtime informant, Edward J. Piscitello, being responsible for the scapegoating of Heimermann for the August 19, 1989 double homicides of Mohammad Binwalee and Dion Russell. (Petition at 4 n.3, 5-7, 11 n.5, 18-19, P. App. at 7a-8a, 21a-22a). *See also* ***Devereaux v. Abbey***, 263 F.3d 1070, 1074-75 (9th Cir. 2001)(en banc)(holding that there is a clearly established Constitutional right due process right not to be subjected to criminal charges based on deliberately fabricated evidence); ***Limone v. United States***, 579 F.3d 79, 94-95 (1st Cir. 2009)("FBI agents knowingly participating in the events leading to the wrongful indictment, prosecution, conviction, and continued incarceration of the scapegoats" subject to due process analysis for outrageous government conduct).

conviction be "expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck***, 512 U.S. at 487; *see also* ***White v. Gittens***, 121 F. 3d 803, 807 (1st Cir. 1997); ***Fottler v. United States***, 73 F. 3d 1064, 1065-66 (10th Cir. 1996); ***Perez v. Sifel***, 57 F. 3d 503, 505 (7th Cir. 1995)(per curiam); ***Trimble v. City of Santa Rosa***, 49 F. 3d 583, 585 (9th Cir. 1995)(per curiam); ***Schafer v. Moore***, 46 F. 3d 43, 45 (8th Cir. 1995).

Here, Heimermann desires to commence a separate action by alleging the aforementioned Fourteenth Amendment violations in a comprehensive original petition for writ of habeas corpus pursuant to ***In Re Davis***, 174 L. Ed. 2d 614, 2009 U.S. LEXIS 5037 (2009). (*See* Section III, *infra*.) That, of course, means that there is a very real possibility that Heimermann may succeed in overturning his 1991 convictions. Therefore, the Wisconsin Court of Appeals' decision that the dismissal be with prejudice offends the authority under ***Heck***, as the lawsuit against the Respondents may be reinstated after Heimermann's convictions are "expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck***, 512 U.S. at 487. Accordingly, the Petition for Rehearing should be granted.

II. REHEARING IS WARRANTED IN LIGHT OF THE WISCONSIN COURT OF APPEALS' IMPROPERLY ENDORSING THE APPLICATION OF THE *HECK* RULE WITHOUT FIRST COMMENCING FACT-FINDING AS A PREREQUISITE ON WHETHER HEIMERMANN'S UNSUCCESSFUL POSTCONVICTION LITIGATION HISTORY IS OWING TO THE RESPONDENTS' COVER-UP OF FOURTEENTH AMENDMENT VIOLATIONS RELATING TO HEIMERMANN'S 1991 CONVICTIONS.

The Wisconsin Court of Appeals' decision was grounded in Heimermann's unsuccessful postconviction litigation history. That court's decision called into question Heimermann having "filed approximately thirty-nine appeals and writs in [the Wisconsin Court of Appeals] since 1991". (P.App. at 3a, ¶3 n.1.) In his Petition to this Court, Heimermann expresses reason for his post-1999 unsuccessful postconviction litigation is that official cover-up by Respondents inherently caused his futility in the litigation. (Petition at 9-18.) In most, if not all respects Heimermann's unsuccessful postconviction litigation history and documented record of courts repeatedly denying Heimermann postconviction relief would arguably *originate* from Respondents obstructing Heimermann access to exculpatory evidence from longtime informant Edward J. Piscitello during a 1999 habeas corpus proceeding in state court. (P. App. at 7a-8a, 21a-22a.)

On February 12, 1999, Swyers was called to testify under oath in ***State of Wisconsin ex rel. Scott A. Heimermann v. Bradley G. Gehring***, Outagamie County Circuit Court, State of Wisconsin, and case no. 99-CV-72, a state-court habeas corpus action commenced by Heimermann. The state-court asked Swyers about her role in promising to find Piscitello and obtain exculpatory information from Piscitello regarding Heimermann's innocence:

"SWYERS: I do want to add there was one thing I agreed to do for him

THE COURT: What was that?

SWYERS: He was trying desperately to locate an inmate by the name of Piscitello who was his co-defendant in his convictions, and he was a protected federal witness, and he was looking for that location, and I did agree, he wanted me to ask the U.S. Attorney if there was a way he could get an affidavit from Mr. Piscitello and I asked the U.S. Attorney, and she was not interested in pursuing that."

(Habeas hearing transcript, Feb. 12, 1999 at 13-14.)

Heimermann then went on to cross-examine Swyers:

"HEIMERMANN: Okay. Did there ever come a time in my capacity of assisting you and the others where you were presented with documentation concerning my protestations of innocence in the criminal matter?

SWYERS: Yes. You inundated me with documents about that matter."

(Habeas hearing transcript, Feb. 12, 1999 at 15-16.)

A separate civil action also was filed against Swyers and her state counterparts by Thomas R. Patzer, who was a target in the investigations Swyers was conducting with state prison officials in 1998. (Swyers' brief at 3.) *See* ***Thomas R. Patzer v. State of Wisconsin Department of Corrections and Dodge County Sheriff's Department***, Dodge County Circuit Court, State of Wisconsin, case no. 98-SC-811. Mr. Patzer alleged under oath in his civil complaint that:

> "On July 3, 1998, your Plaintiff was retained by Robert Fecke on behalf of Scott A. Heimermann for investigative services in conjunction to Mr. Heimermann's appeal from a criminal conviction. On July 14, 1998, your Plaintiff entered into a written contract with Mr. Heimermann for investigative services to be rendered at $40.00 per hour, plus all out-of-pocket expenses . . . In his capacity as an 'confidential informant' [at the time Mr. Heimermann entered into the written contract with your claimant: said signing of said contract was predicate to the carrying out of [Responcent] Dehann and Swyers' overall objective against the Plaintiff."

(Patzer sworn civil complaint at ¶¶2,9.)[3]

The fact that Swyers and Respondent Dehaan had advocated that Heimermann hire Patzer *on the pretext* as a private investigator in Heimermann's efforts to find Piscitello during the undercover investigation of Fecke et al. makes Swyers' "the U.S. Attorney was not interested in pursuing" Piscitello testimony as the basics of Heimermann's claim for official cover-up of Fourteenth Amendment violations during the 1999 habeas corpus proceeding. (P. App. at 7a-8a, 21a-22a.) In this case, Swyers knew via tracking Patzer's movements in the Fecke et al. investigations that Piscitello was not in the custody of the feds, but rather, that Piscitello was transferred by the Wisconsin Department of Corrections to a penal institution in the state of Florida in April 1996. However, under the circumstances presented with Piscitello's protection status, the Florida corrections system would not permit Patzer to make contact with Piscitello without permission from the Wisconsin corrections department. In short, Swyers' purported explanation for not providing Heimermann access to Piscitello's information in 1999 precluded him from invalidating his convictions pursuant to ***Heck***.

For obvious reasons the Respondents' obstruction of justice at the 1999 habeas corpus proceeding would seem to be a factor weighing heavily in causing Heimermann to behave and litigate in ways that pre-empted success for him in the courts since 1999. In considering claims for official cover-up of Constitutional violations, courts have decided against applying the ***Heck*** rule. *See* ***Cabrera v. City of Huntington***, 159 F. 3d 374, 380-81 (9th Cir. 1998). In the present case, the Wisconsin Court of Appeals applied ***Heck***

[3] This information of Patzer's lawsuit against Swyers et al. can also be confirmed by this Court taking judicial notice of the Wisconsin Circuit Court Access Program available at *http://wcca.wicourts.gov/index.xsl*

without first determining whether Heimermann's post-1999 unsuccessful postconviction litigation history flowed from the Respondents' cover-up of alleged Fourteenth Amendment violations relating to Heimermann's convictions at the 1999 habeas corpus proceeding.

In helping this Court evaluate the sufficiency of the access to courts claims, by way of analogy, there is the 1970s-era price ceiling on gasoline. By causing prices at the pump to lie about the scarcity of oil, that price ceiling led Americans to waste untold hours waiting in lines to fuel their cars. Similar waste occurs when official cover-up succeeds for a time in a criminal defendant's postconviction efforts. Here, Swyers and her state prison confederates succeeded for a time in hiding the existence of important evidence from informer Piscitello that directly addressed the aforementioned Fourteenth Amendment violations about Milwaukee law enforcement being responsible for the scapegoating of Heimermann in the murders of Binwalee and Russell.

In her brief to this Court, Swyers advocated that there should be no importance attached to Heimermann's Fourteenth Amendment claims because he has been "unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison". (Swyers' brief at 9.) In light of the fact that the courts have never held an evidentiary hearing on Piscitello's information, it is not clear why the courts have repeatedly refused to grant Heimermann's release on Piscitello's evidence, but perhaps it is because Piscitello seems like an individual the courts do not find credible, particularly if he has a proven status as a liar. (Petition at 3-4.) In any event, that perception should have changed in 2007 when Heimermann had discovered independent documentary parts of Piscitello's postconviction information in which is based upon Milwaukee law

enforcement facilitating the release from custody of murder victim Binwalee for the apparent war on drugs against Binwalee and his gang in 1989. (Petition at 13.) Therefore, that 2007 independent finding became the game-changer. It self-validated Piscitello's 2002 information in which he states "[s]everal weeks before the double homicide occurred, I personally learned through my law enforcement handlers that Mr. Binwalee had been arrested by Milwaukee police on a traffic violation, and later, after Detective Debraska learned of Mr. Binwalee's arrest, he cut a deal and let him back on the street in order for us to tail him to see what else he would be up to," Piscitello wrote. (Piscitello affidavit Sept. 10, 2002, ¶ 10.)[4] In other words, if Piscitello had intended to fabricate any of the information he provided in 2002, he would have had to know years before that the 1989 release from custody of Binwalee was not a sure-fire bet.

Heimermann has also sought access to the "as-yet-undisclosed state evidence" consisting of "records presumably still being withheld by the county prosecutors and Milwaukee law enforcement". (Petition at 13-14.) This new evidence would also help cement Piscitello's truthfulness in his various affidavits. Such as-yet-undisclosed state evidence would track what Milwaukee law enforcement knew during the 1989 timeline when informer Piscitello initiated contact with naïve Heimermann in mid-April 1989 and thereafter used him as an unwitting front person in the days leading to the murders of Binwalee and Russell. (Petition at 2-3,13-15.)

So the evidence is there to prove Piscitello and his Milwaukee law enforcement handlers framed Heimermann for the 1989 homicides of Binwalee and Russell. Therefore, in the context of Sawyers' arguing that Heimermann 'was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison" is

[4] See 1994 App. to pet. for writ of habeas corpus, 55-56 (Petition at 9-10).

actually a validation that Swyers covered-up Milwaukee law enforcement misdeeds postconviction by obstructing Heimermann's repeated efforts to clearing his name since his 1999 habeas corpus proceeding.

In short, the overall claim of Respondents' cover-up of Fourteenth Amendment violations concerning Milwaukee law enforcement knowingly participating in the 1991 events leading to the wrongful charging, prosecution, conviction, and continued imprisonment of Heimermann is not barred under *Heck* pursuant to *Cabrera*. *See* 159 F. 3d at 381. The remedy therefore is remanding the case to the Wisconsin Court of Appeals for fact-finding on whether Heimermann's unsuccessful postconviction litigation flowed from Respondents' cover-up of these Fourteenth Amendment violations in order to ensure that this Court has before it a fully developed factual record in a concrete case. Accordingly, the Petition for Rehearing should be granted.

III. REHEARING IS APPROPRIATE WHERE OTHER GROUNDS SUFFICE TO JUSTIFY HEIMERMANN'S REQUEST FOR EXTRAORDINARY RELIEF.

Finally, rehearing is warranted where, as here, substantial grounds to overturn Heimermann's 1991 convictions exist, underscoring that the Wisconsin Court of Appeals' decision in affirming dismissal of Heimermann's sworn civil complaint, pursuant to *Heck*, with prejudice, is in itself a momentous injustice, because such a decision now precludes Heimermann from ever obtaining any damages resulting from Respondents' obstruction of justice in 1999. (Petition at 30-31.)

Swyers has indicated that allowing Heimermann to file another postconviction or habeas actions would be "relief unique to Petitioner's circumstances born of years and years of post-conviction litigation" (Swyers' brief at 20.) But in applying the above-cited

Davis factors in this case. *Davis* also had unsuccessfully pursued "years and years of post-conviction litigation" based on same or similar claims. Still, this Court took the extraordinary step of ordering a district court to hold an evidentiary hearing for a determination of whether the Petitioner had made a showing that clearly establishes his innocence of the crime for which he was convicted by demonstrating that seven of the state's witnesses against Davis recanted their trial testimony via postconviction affidavits. *See* 2009 U.S. LEXIS 5037 at *1 (Stevens J., concurring). Heimermann's case is very much similar to the factual circumstances presented in ***Davis*** (including, incidentally, that both alleged crimes in ***Davis*** and Heimermann cases happened on August 19, 1989).

During Heimermann's 1991 prosecution, the State told the trial court and jury that Heimermann knowingly played an important role with Piscitello to murder Binwalee and Russell. (Petition at 5-7.)

Piscitello, a longstanding informant who was on Milwaukee law enforcement's payroll during the time of the August 19, 1989 murders, and who participated with Milwaukee police in the events leading to the wrongful arrest and murders charged of Heimermann, has postconviction recanted his 1991 testimony to blow the whistle on his employer, and which new evidence now implicates Milwaukee law enforcement in 1989 being responsible for the murders of Binwalee and Russell, as well as knowingly participating in the scapegoating of Heimermann. (Petition at 9-10,18-19.) In short, Milwaukee law enforcement allowed an individual like Piscitello who had known violent tendencies[5] to interact with naïve Heimermann, a former farm boy from rural Chilton,

[5] Milwaukee law enforcement may not have told Piscitello that he could skate out a death sentence to Binwalee and Russell, but Piscitello's free wheeling arrogance and longstanding employment with Milwaukee law enforcement certainly fed into Piscitello's violent tendencies.

and use Heimermann as an unwitting front person in the days leading to the two homicides and afterwards. (Petition at 2-3.)[9]

When considering such a claim of outrageous government conduct the courts generally consider whether "the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with *significant encouragement*, either overt or covert, or when the private actor operates as a *willful participant in joint activity* with the state or its agents, is controlled by an agency of the state, has been delegated a public function by the state, or is *entwined with government policies*." *U.S. v. Stein*, 541 F. 3d 130, 147 (2nd Cir. 2008)(citations omitted). Here, the Wisconsin Court of Appeals understood that based upon the postconviction information from Piscitello "the criminal complaint upon which Heimermann has been convicted should be dismissed with prejudice" because of the "fraud and outrageous government conduct" between Piscitello and Milwaukee law enforcement. (P. App. 7a-8a; *see also* Petition at 18 (quoting sworn civil complaint at ¶¶37-38)). Add to that the common link between Milwaukee police detective Barry Debraska Jr., a vice-squad specialist, Milwaukee police detective Brian O'Keefe, the lead homicide detective in the Binwalee murder, and Piscitello -- Piscitello and Debraska worked at the 1989 drug investigations against Binwalee and his gang; then Debraska, O'Keefe and Piscitello worked the 1991 murder investigation in a scheme to falsify, omit and conceal information about

[9] In her brief to this Court, Sawyer makes much of Heimermann bringing up his "expansive background, beginning with his own upbringing ..." (Sawyer Brief at 2.) Heimermann replies by stating that the State's allegation that he may have been engaged in a double murder is not only based on deliberately fabricated evidence, but it is entirely at odds with the person he really is, which is supported by his good upbringing in rural Chilton. That, and with anything else the State of Wisconsin could have learned about him since 1991, makes strategic sense as to why Heimermann brought up his "expansive background, beginning with his own upbringing" because, it is very relevant to showing that Court his innocence of the crime for which he was convicted.

Heimermann aiding and abetting in the murders of Binwalee and Russell;[7] and then Debraska and O'Keefe were involved in a plot in 1995 to fabricate evidence and to falsely show that Customs Agent Buford Gates covered up the murders of Binwalee and Russell, when Gates did not. (Petition at 9-11.)

Therefore, Piscitello has flat out given himself a leadership role and a level of intimate knowledge of the 1989 drug operations against Binwalee and his gang in the days leading to his murder including his participating in the 1991 events leading to the wrongful arrest and murder charges of Heimermann. There is a clarity and specificity of Piscitello's various affidavits here, along with the aforementioned 2007 independent evidence of Binwalee's release in 1989 and the 'as-yet-undisclosed state evidence,' that combined makes for impressive evidence in overturning Heimermann's 1991 convictions and for this Court reversing course and grant certiorari in this case. Accordingly, the Petition for Rehearing should be granted.

[7] This is part of Piscitello's "arrogance" where he said to Heimermann [r]emember I put you in prison with what was called the perfect crime. Therefore, I can get you out as well!!!" (Petition at 10.)

CONCLUSION

The Court should grant this Petition for Rehearing, and remand the case to the Wisconsin Court of Appeals. Alternatively, this Petition should be granted, the order entered November 2, 2009, denying the Petition for Writ of Certiorari should be vacated, and the Petition for Writ of Certiorari should be granted.

Dated this 25th day of November 2009.

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that I am not a member of the bar of this Court, but I am a party proceeding *pro se*, and that on this 25th day of November 2009, I caused to be filed a Petition for Rehearing. The Petition for Rehearing is presented in good faith and not for delay.

Dated this 25th day of November 2009.

BY: _____
Scott A. Heimermann
Petitioner *pro se*